This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

3 2044 078 604 402

HARVARD LAW LIBRARY

WISCONSIN REPORTS

124 June 24

CASES DETERMINED

IN THE

SUPREME COURT

OF

144

WISCONSIN

JANUARY 31 — MAY 2, 1905.

FREDERIC K. CONOVER
OFFICIAL REPORTER

CHICAGO
CALLAGHAN AND COMPANY
1906

Entered according to Act of Congress in the year one thousand nine hundred and six,
By WALTER L. HOUSER,
Secretary of State of the State of Wisconsin, in trust for the benefit of the people of the said State, in the office of the Librarian of Congress, at Washington.

Rec. March 8, 1906

STATE JOURNAL PRINTING COMPANY,
PRINTERS AND STEREOTYPERS,
MADISON, WIS.

JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

JOHN B. CASSODAY,
Ex officio CHIEF JUSTICE.
JOHN B. WINSLOW,
ROUJET D. MARSHALL,
JOSHUA ERIC DODGE,
ROBERT G. SIEBECKER,
JAMES C. KERWIN

Attorney General, - L. M. STURDEVANT,

Clerk, - - - CLARENCE KELLOGG.

SUPREME COURT RULES.

RULE XVIII, AS AMENDED APRIL 10, 1905.

Before the calling of a calendar cause, the plaintiff in error or appellant shall file with the clerk of this court ten copies of the printed case and each party shall file with the clerk ten copies of his printed brief or briefs. The clerk shall deliver one copy of each to each of the justices and one to the reporter and one to the state law librarian.

ERRORS NOTED IN PREVIOUS VOLUMES.

VOL. 122.

Page 288, line 22. For *C. T. Bundy*, read *R. P. Wilcox.*

VOL. 123.

Page xxii. Read Gibbs v. Larrabee, 23 W. 496 - - - 460

TABLE

OF

CASES REPORTED.

Aebi v. Bank of Evansville *73*

Bank checks: Indorsement and deposit in another bank: Presentment: Delay: Loss of check: Discharge of indorser: Renewal of liability by new contract.

Alexander & Edgar Lumber Co. v. McGeehan *325*

Agency: Failure to disclose: Personal liability of agent.

Alexander & Edgar Lumber Co., McKivergan v *60*

Arnold, Buell v *65*

Arnold v. Randall *1*

Res judicata: Judgment in another action.

Bank of Evansville, Aebi v *73*

Bates v. State *612*

Criminal law: Obtaining money by false pretenses: Bank draft cashed in another state: Materiality of false statements: Instructions to jury: Information: Defective counts: General verdict.

Birdsall v. Kewaunee County *576*

County board: Allowance of fees of officers in justices' courts: Statute, mandatory or directory? Repugnant provisions: Appeal: Jurisdiction.

Brehm v. United States Fidelity & Guaranty Co *339*

Guardian and ward: Cumulative bond: Discharge of sureties, when valid: Liability: Prior conversion of moneys: Failure to account.

Brinsley v. Schulz *426*

Malicious prosecution: Advice of counsel: Evidence.

Buell v. Arnold 65

Counties: Judgments: Execution: Lien on lands: "Person."

Burgson v. Jacobson 295

Deeds: Conditions subsequent: Conveyance by parent to child: Covenant: Breach: Equity: Reformation.

Burnham, Kuenzli v 480

Canterbury v. Northwestern Mutual Life Ins. Co 169

Life insurance: Assignability of wife's beneficiary right.

Chase's Appeal (Kuenzli v. Burnham) 480
Chicago Brass Co., Yess v 406
Chicago, Milwaukee & St. Paul R. Co., Smith v 120
Chicago, Milwaukee & St. Paul R. Co., Tiborsky v 243
Chicago, St. Paul, M. & O. R. Co., Nevius v 313
Chicago, St. Paul, M. & O. R. Co., Washburn Land Co. v. 305
Chippewa Valley Bank, Eau Claire Nat. Bank v 520
Cobb v. Simon 467

Master and servant: Liability for torts outside scope of employment.

Collier v. Town of Scott 400

Public health: Powers of health officer: Employment of physician: When town liable.

Common Council of Wauwatosa, State ex rel. Leisk v ... 451
C. Reiss Coal Co., Faber v 554

Damkoehler v. City of Milwaukee 144

Municipal corporations: Street improvements: What are "abutting lots:" Rights of nonabutting owners: Negligence in doing work: Removal of lateral support.

Davis, Lounsbury v 432
DeForest, State ex rel., v. Hobe 8
Douglas County, First Nat. Bank v 15

Eau Claire Nat. Bank v. Chippewa Valley Bank 520

Garnishment: Bank: Fraudulently transferred note and mortgage received for collection: Interpleader: Judgment: Interest: Costs.

Eberle, Schultz v 594
Edward Hines Lumber Co., McCord v 509
Edwards v. Wisconsin Investment Co 315

Sale: Property included: Chattel mortgage: Parol evidence to explain bill of sale.

Eggen v. Fox 534

New trial: Discretion: Appeal: Dismissal.

Ellison, Fleming v 36
Emerson v. Nash 369

(1-13) Pleading: Liberal construction: Demurrer: Indefiniteness: Joinder of causes: "Same transaction:" "Same subject of action:" Primary rights. (14) Contract to obtain options on land: Performance: Waiver.

Equitable Life Assurance Society v. Host 657

Life insurance: Distribution of surplus: Periods: Statutes construed: "May" and "shall:" Revocation of license: Judgment: Validity of policies.

Faber v. C. Reiss Coal Co 554

Master and servant: Personal injury: Assumption of risk: Expert testimony: Examination of jurors: Pecuniary interest: Remarks of counsel: Prejudicial error.

Ferguson v. Woods (McIntyre's Estate) 544

Executors and administrators: Judgment against, for costs: Priority of payment.

Fidelity and Casualty Co., Silverman v 459
First Nat. Bank v. Douglas County 15

Taxation: Double taxation: Exemptions: "Capital" of bank: Property purchased with capital: Voluntary payment: Purchase of void tax certificate through attorney: Return of money paid: Counties.

Fisher, State ex rel. J. S. Stearns Lumber Co. v 271
Fleming v. Ellison 36

Action for specific performance: Recovery of damages: Changing cause of action: Death of party: Revival of action: Laches: Discretion.

Fox, Eggen v 534

Francisco v. Hatch 220

Affirmance on equal division of court.

Franey, Reddington v 590

Fromme v. O'Donnell 529

Sales: Passing of title: Subsequent measurement and determination of amount due.

Gates Land Co. v. Ostrander 287

Grand Lodge, Hermann's Sons v. Lemke 483

Life insurance: Benefit associations: Who may be beneficiaries: "Survivors."

Greek-American Sponge Co. v. Richardson Drug Co. ... 469

Interstate commerce: Sale of goods in original package: Shipment for inspection: Right of foreign corporation not authorized to do business in this state.

Grotjan v. Rice 253

Implied contract to pay for services: Minor: Emancipation: Evidence: Instructions to jury: Material and immaterial errors.

Hamar v. Leihy 265

Municipal corporations: Street improvements: Special assessments: Tax certificates: Limitation of actions.

Hammacher v. Town of New Berlin 249

Highways: Duty of town: Injury to pedestrian on footpath: Absence of railing at culvert: Proximate cause: Judgment *non obstante.*

Hanlon, State ex rel., v. Russell 548

Hatch, Francisco v 220

Haubner v. City of Milwaukee 153

(1) Actions: Consolidation: Order of trial. (2–7) Municipal corporations: Special assessments for street improvements: Validity: Reassessment: Right of abutting owner to damages: Milwaukee city charter.

Hayssen, Stehn v 583

Heinrichs, Off v 440

Hermann's Sons v. Lemke 483

Hershey Lumber Co., Jacobs v 54

Highland, Town of, Johnson v 597
Hines Lumber Co., McCord v 509
Hobe, State ex rel. deForest v 8
Holmes v. State 133

Criminal law and practice: Assault with intent to kill: Self-defense: Evidence: Instructions to jury.

Host, Equitable Life Assurance Society v 657
Huber v. Stark 359

Adjoining landowners: Projection of eaves over boundary line: Continuing trespass: Remedies: License: Revocation: Discharge of rainfall on land of another.

Hunt v. McDonald 82

Liens: Homestead: Foreclosure: Vacating judgment: Application of wife to be made party: Discretion.

In re Milwaukee Southern R. Co 490

Railroads: Condemnation of lands: Due incorporation, how proven: Termini and length of road: Survey: Intention to construct Dismissal of proceedings as to part of lands: Crossing streets, etc.: Taking park land.

Jacobs v. Hershey Lumber Co 54

Logs and logging: Overflow of lands: Liability.

Jacobson, Burgson v 295
James v. State 130

Criminal law: Rape: Information: Surplusage: Verdict: Certainty: Evidence: Physicians: Privilege: Confessions: Review: Bill of exceptions.

J. L. Gates Land Co. v. Ostrander 287

Contracts: Specific performance: Statute of frauds: Oral agreement for sale of lands: Part performance.

Johnson v. Town of Highland 597

Highways: Insufficiency: Injury to traction engine: Duty of town: Court and jury: Contributory negligence: Opinion evidence.

Johnson, Wilmarth v 320
J. S. Stearns Lumber Co., State ex rel., v. Fisher 271

J. V. LeClair Co. v. Rogers-Ruger Co 44

Money had and received: Collection of debt due former partners: Evidence: Competency of witnesses.

Kenney v. State 486

Manslaughter: Killing in heat of passion, without design, etc.: Involuntary killing while committing assault: Preconcerted joint assault.

Kerr Co., O'Niel v 234
Kewaunee County, Birdsall v 576
Kingston v. Kingston 263

Appealable orders: "Final order" in special proceeding

Koelzer, Kruse v 536
Kruse v. Koelzer 536

Reformation of deed: Mistake: Acceptance: Laches: Antecedent contract: Parol evidence: Practical construction by parties.

Kuenzli v. Burnham 480

Appeal: Reversal: Mandate directing judgment: Power of trial court.

Lake, Town of, Stoltman v 462
Laursen, Rylander v 2
LeClair Co. v. Rogers-Ruger Co 44
Leihy, Hamar v 265
Leisk, State ex rel., v. Common Council of Wauwatosa .. 451
Lemke, Grand Lodge of Hermann's Sons v 483
Lounsbury v. Davis 432

Master and servant: Negligence: Death of servant: Fall of derrick in quarry: Assumption of risk: Court and jury: Special verdict: Instructions: Evidence: Pleading: Surplusage.

Lucas v. Sheridan 567

Conversion of personal property: Sheriff: Offer to return: Injury to goods: Instructions to jury.

Madler v. Pozorski 477

Agency to sell land: Sale by subagent: Agreement to divide profits: Inconsistent positions: Evidence.

Malone, Snyder v *114*

Manning v. School District No. 6 ..... *84*

(1-4) Pleading: Counterclaim: Construction: Reference to other portions of answer. (5-8) Evidence: Basis of opinion: Statements of employees: Memoranda. (9-21) Contracts: Substantial and partial performance: Measure of recovery: Work to be "satisfactory:" Acceptance; *Quantum meruit:* Instructions to jury.

McCall Co. v. Stone *572*

Pleading: Demurrer to part of a defense.

McCord v. Edward Hines Lumber Co *509*

Statute of frauds: Oral promise to answer for debt of another: Advances on logging contract.

McDonald, Hunt v *82*

McGeehan, Alexander & Edgar Lumber Co. v. *325*

McIntyre's Estate (Ferguson v. Woods) *544*

McKivergan v. Alexander & Edgar Lumber Co *60*

Railroads: Injury to servant: Negligence of fellow-servant: Construction of statute.

Merrick v. Northwestern National Life Ins. Co *221*

Life insurance: Wrongfully declared forfeiture: Right of action of wife as beneficiary: Joinder of parties: Measure of damages.

Miles v. Pike Mining Co *278*

Fraudulent representations: Mining option: Notice of assessments: Payment by administrator: Right to recover: Conversion.

Milwaukee, City of, Damkoehler v *144*

Milwaukee, City of, Haubner v *153*

Milwaukee Southern R. Co., In re *490*

Montreal, Town of, Town of Vaughn v *302*

Morgenroth v. Spencer *564*

Husband and wife: Services of physician to wife living separate: Liability of husband: Evidence: Burden of proof: Wife as witness.

Murphy v. State *635*

Criminal law: Arrest and examination: Complaint on information and belief: Bribery: Official action of common councilor: Grand jury: Evidence of proceedings: Immunity of witness: Testimony of accomplices: Instructions to jury.

Nash, Emerson v 369
Nergaard, State v 414
Nevius v. Chicago, St. Paul, M. & O. R. Co 313

Railroads: Carriage of live stock: Injury from defect in car: Contract accepting car: Knowledge of defect: Court and jury.

New Berlin, Town of, Hammacher v 249
Northwestern Mutual Life Ins. Co., Canterbury v 169
Northwestern National Life Ins. Co., Merrick v 221
North Wisconsin Lumber Co., Williams v 328

O'Donnell, Fromme v 529
Off v. Heinrichs 440

Ejectment: Description of land: Error in courses and distances: Fence as boundary: Adverse possession.

Oneida County, Pier v 398
O'Niel v. Wm. B. H. Kerr Co 234

Assignment of fund not in existence: Equitable lien.

Ostrander, J. L. Gates Land Co. v 287

Peck v. Peck 550

Guaranty: Consideration: Evidence: Special verdict: Instructions to jury: Immaterial errors.

Pier v. Oneida County 398

Judgment: Vacating: Right of a person not a party.

Pike Mining Co., Miles v 278
Pozorski, Madler v 477

Randall, Arnold v 1
Reddington v. Franey 590

Partnership: Lien of creditors: Sale of partner's interest: Agreement to pay debts: Rights and liabilities of incoming partner.

Reiss Coal Co., Faber v 554
Rice, Grotjan v 253
Richardson Drug Co., Greek-American Sponge Co. v .. 469
Rogers-Ruger Co., J. V. LeClair Co. v 44

Russell, State ex rel. Hanlon v *548*
Rylander v. Laursen *2*

Negligence: Sparks escaping from sawmill: Test of care required: Instructions to jury: Competency of witness as to value.

Scanlan, Wells v *229*
Schmidt v. State *516*

Criminal law: Manslaughter in fourth degree: Self-defense: Degree of force: Instructions to jury: Curing error.

Schneider v. Schneider *111*

Wills: Life tenant: Consuming corpus of estate: Power of sale.

School District No. 6, Manning v *84*
Schultz v. Eberle *594*

Real-estate brokers: Right to commission: Court and jury.

Schulz, Brinsley v *426*
Scott, Town of, Collier v *400*
S. D. Seavey Co., Tourville v *56*
Sexton, State ex rel. Shawano County v *352*
Shanley, Wiesmann v *431*
Shawano County, State ex rel., v. Sexton *352*
Sheridan, Lucas v *567*
Shirley v. City of Waukesha *232*

Municipal corporations: Special assessments for improvements: Voluntary payment: Reassessment.

Silverman v. Fidelity and Casualty Co *459*

Appeal: Effect of dismissal: Direction for further proceedings: County courts.

Simon, Cobb v *467*
Smith v. Chicago, Milwaukee & St. Paul R. Co *120*

Limitation of actions: Personal injuries: Notice: Service: Waiver: Estoppel: Railway claim agent.

Snyder v. Malone *114*

(1) Municipal courts: Courts of record: Adjournments. (2) Promissory note: Wrongful transfer before delivery: Judgment: Assignment: Satisfaction.

Sonnenberg v. State..... *124*

Bastardy: Support of child prior to judgment: Instructions to jury: Payment of costs: Bond.

Spencer, Morgenroth v..... *564*

Spooner, Town of, v. Washburn County..... *24*

Taxation: Collection of delinquent taxes: Accounting between county and town: Power of county board: Supervisor as representative of town: Amount due the county: Taking of tax deeds: Compromise of taxes: Invalid taxes: Costs of action: Interest.

Stark, Huber v..... *359*

State, Bates v..... *612*

State, Holmes v..... *133*

State, James v..... *130*

State, Kenney v..... *486*

State, Murphy v..... *635*

State v. Nergaard..... *414*

Fish and game: Preservation: Constitutional law: Unlawful shipment: Forfeitures: Pleading: Evidence: Cross-examination of defendant: Place where fish were taken: Court and jury: Degree of proof necessary.

State, Schmidt v..... *516*

State, Sonnenberg v..... *124*

State, Steward v..... *623*

State, Ullman v..... *602*

State ex rel. deForest v. Hobe..... *8*

(1) Statutes: Construction. (2, 3) Taxation: Board of review: Depositions not admissible: Waiver.

State ex rel. Hanlon v. Russell..... *548*

Municipal corporations: Lighting franchise: Submission to electors: Petition.

State ex rel. J. S. Stearns Lumber Co. v. Fisher..... *271*

Taxation: Saw logs: Place of assessment: Valuation: Board of review: Evidence: Decision: Reversal on *certiorari*.

State ex rel. Leisk v. Common Council of Wauwatosa... *451*

Street railways: Extension of existing system: Ordinances: Submission to vote of electors.

State ex rel. Shawano County v. Sexton *352*

Highways: Town-line road: Repair of bridge by county: Liability of town.

Stearns Lumber Co., State ex rel., v. Fisher *271*

Stehn v. Hayssen *583*

Circuit and county courts: Jurisdiction: Estates of decedents: Partnership: Accounting: Wills: Construction: Title to personalty: Laches: Limitation of actions: When cause of action accrues: Failure to present claim against decedent: Pleading: Demurrer: Presumptions.

Steward v. State *623*

Criminal law: Evidence: Rebuttal: Discretion: Insanity: Special issue: Form of verdict: Sanity at time of trial: Duty to make inquisition: Instructions: Court and jury.

Stoltman v. Town of Lake *462*

Justices' courts in Milwaukee county: Jurisdiction: Violation of municipal ordinances: Orders of board of health: "Fines:" Appeal.

Stone, McCall Co. v *572*

Tiborsky v. Chicago, Milwaukee & St. Paul R. Co *243*

Railroads: Negligence: Presumption from accident: Truck left on sidewalk: Court and jury: Evidence: *Res gestæ.*

Tourville v. S. D. Seavey Co *56*

(1) *Certiorari:* Petition: Waiver of defects. (2) Municipal courts: Adjournments: Docket entries: Jurisdiction.

Ullman v. State *602*

Criminal law and practice: Jurors: Challenge to the array, how made and determined: Waiver: Jury lists: Drawing: Harmless irregularities: Assault with intent to kill: Evidence: Opinions: Appeal: Bill of exceptions.

United States Fidelity & Guaranty Co., Brehm v *339*

Vaughn, Town of, v. Town of Montreal *302*

Towns: Division: Apportionment of "indebtedness then incurred:" Water rentals.

Washburn County, Town of Spooner v *24*
Washburn Land Co. v. Chicago, St. Paul, M. & O. R. Co. *305*
Tax deeds: Form: Compliance with statutory requirements: Record.

Waukesha, City of, Shirley v *239*
Wauwatosa Common Council, State ex rel. Leisk v *451*
Wells v. Scanlan *229*
Mortgages: Deed and defeasance: Limitations: Where cause of action accrues.

Wiesmann v. Shanley *431*
Appealable order: Striking out parts of pleading.

Williams v. North Wisconsin Lumber Co *328*
Negligence: Amendment of pleading: Instructions to jury: Defining "ordinary care:" Master and servant: Who are fellow-servants: Negligence in making repairs: Court and jury.

Wilmarth v. Johnson *320*
Mortgages: Application of rents payable to mortgagee: Accounting.

Wisconsin Investment Co., Edwards v *315*
Wm. B. H. Kerr Co., O'Niel v *234*
Woods, Ferguson v *544*

Yess v. Chicago Brass Co *406*
Master and servant: Negligence: Personal injuries: Assumption of risk: Proximate cause: Hidden danger: Failure to instruct.

TABLE

OF

CASES CITED BY THE COURT.

Abbot v. McCadden 81 W. 563 560
Abraham v. Karger 100 W. 387 532
Abrams v. M., L. S. & W. R. Co. 87 W. 485 - - - 315
Adams v. Bissell 28 Barb. 382 386, 389
——— v. C. & N. W. R. Co. 89 W. 645 - - - - - 571
——— v. Fitzgerald 14 Ga. 36 58
Adams R. & B. Works v. Schnader 155 Pa. St. 394 - 103
Adamson v. Raymer 94 W. 243 431
Adirondack R. Co. v. State 176 U. S. 335 - - - - - 503
Ætna Ins. Co. v. Aldrich 38 W. 107 - - - - - - 400
Aiken v. Benedict 39 Barb. 400 362
Alabama G. L. Ins. Co. v. Garmany 74 Ga. 51 - - 228
Alexander v. Milwaukee 16 W. 247 - - - - - 149
Allen v. Clausen 114 W. 244 - 496
——— v. Logan 96 Mo. 591 - 593
——— v. McKibbin 5 Mich. 449 - - - - - - 105
——— v. Perry 56 W. 178 - 262
Amberg v. Manhattan L. Ins. Co. 171 N. Y. 314 183, 210, 216
American Exp. Co. v. Iowa 196 U. S. 133 - - - - 476
Amick v. Butler 111 Ind. 578 187, 200
Anderson v. Baxter 4 Oreg. 105 233
Archibald v. M. L. I. Co. 38 W. 542 - 186-8, 190, 192, 198-201, 217
Argersinger v. Macnaughton 114 N. Y. 535 - - - - 327
Armstrong v. Luco 102 Cal. 272 366
Arndt v. Griggs 134 U. S. 316 233
Arnold v. Randall 121 W. 462 2
Ashland L., S. & C. Co. v. Shores 105 W. 122 - - 100
Ashland L. Co. v. Detroit S. Co. 114 W. 78 - - - - - 668
Atkinson v. C. & N. W. R. Co. 93 W. 362 - - - - - 123
Atlantic & O. R. Co. v. Sullivant 5 Ohio St. 276 - - 505
Austin v. Holt 32 W. 478 307-312
Ayers v. Reidel 84 W. 276 447, 448

Babcock v. Fond du Lac 58 W. 230 - - - - - - 242
Bach v. Parmely 35 W. 238 - 567
Baker v. State 65 W. 50 - - 128
——— v. ——— 31 Ohio St. 314 615
Ballou v. Gile 50 W. 614 187, 188, 199
Bank Tax Cases 2 Wall. 200 - 21
Barnes v. Beloit 19 W. 93 - 225
Baron v. Brummer 100 N. Y. 372 216
Barrett v. Hill Co. 74 S. W. 811 405
Barry v. Equitable L. A. Soc. 59 N. Y. 587 - - 187, 209
——— v. Peterson 48 Mich. 263 366
Barton v. Bruley 119 W. 326 - 422
Bassett v. Warner 23 W. 673 - 382
Bates v. C., M. & St. P. R. Co. 60 W. 296 - - - - - 525
Battis v. Hamlin 22 W. 669 - 122
Batz v. Woerpel 113 W. 442 - 449
Baumann v. C. Reiss C. Co. 118 W. 330 - - - - - 337
Baxter v. C. & N. W. R. Co. 104 W. 307 - - - - - 4
Beebe v. Griffing 6 N. Y. 465 264
——— v. Wis. M. L. Co. 117 W. 328 - - - 231, 542
Beeson v. Busenbark 44 Kan. 669 - - - - - - - 64
Benchley v. Chapin 10 Cush. 173 - - - - - - 350
Benton v. Martin 31 N. Y. 382 80
——— v. ——— 40 N. Y. 345 - 80
——— v. ——— 52 N. Y. 570 - 80

Berg v. Damkoehler 112 W. 587 - - - - - - 189
Beyersdorf v. Cream City S. & D. Co. 109 W. 456 - - 246
Binkley v. Jarvis 102 Ill. App. 59 - - - - - 187, 200
Bishop v. Bleyer 105 W. 332 - 449
——— v. Price 24 W. 480 - 105
Black v. State 59 W. 471 - 656
Blakely v. Smock 96 W. 611 - 588
Bliss v. State 117 W. 596 - 248
Bloodgood v. Meissner 84 W. 452 - - - - - - 527
Bloor v. Smith 112 W. 340 - 42
——— v. ——— 119 W. 163 - 482
Boland v. Gillett 44 W. 329 - 122
Boldewahn v. Schmidt 89 W. 444 - - - - - - 570
Booth v. F. & M. Nat. Bank 74 N. Y. 228 - - - - - 119
Borst v. Sharon 24 App. Div. 599 - - - - - 123, 124
Boston & A. R. Co., *In re*, 53 N. Y. 574 - - - - - 503
Bostwick v. Mut. L. Ins. Co. 116 W. 392 - - - - - 541
Bourda v. Jones 110 W. 52 97-99
Bowman v. C. & N. W. R. Co. 125 U. S. 465 - - - 475
Boyce v. Wilbur L. Co. 119 W. 642 - - - - - - - 5
Boyden v. Mass. M. L. Ins. Co. 153 Mass. 544 - - 184
Bradley v. Cole 67 Iowa 650 233
Bragg v. Gaynor 85 W. 468 - 527
Brauchle v. Nothhelfer 107 W. 457 - - - - - - 93
Breitung, Estate of, 78 W. 33 187, 188, 199
Brickley v. Walker 68 W. 563 570
Brinkman v. Jones 44 W. 498 231
Brock v. Hishen 40 W. 674 - 167
Brokaw v. Comm'rs 130 Ill. 482 - - - - - - - 672
Brown v. C. & N. W. R. Co. 102 W. 137 - - - - - 439
——— v. Foster 113 Mass. 136 103
——— v. Gates 15 W. Va. 131 69, 70
——— v. Johnson 115 W. 430 542
——— v. Kellogg 17 W. 475 - 59
——— v. Maryland 12 Wheat. 419 - - - - - - - 475
——— v. McGee's Estate 117 W. 389 - - - - - - 547
——— v. Neilson 61 Neb. 765 238
——— v. Walker 161 U. S. 591 651
——— v. Worden 39 W. 432 - 567
Bruendl, Will of, 102 W. 45 - 132
Brummer v. Cohn 86 N. Y. 11 183
Bucklin v. Ford 5 Barb. 393 - 589
Budd v. Rutherford 4 Ind. App. 390 - - - - - - 671
Buel v. State 104 W. 132 - 422, 423
Buffalo, *In re*, 68 N. Y. 167 - 503
Buffalo & B. P. R. Co. v. Comm'rs 10 How. Pr. 237 - 672
Buffham v. Racine 26 W. 449 73
Bunker v. Hudson 122 W. 43 149, 151, 168
Burd v. State 39 Tex. 509 - 620
Burke v. Dulaney 153 U. S. 228 119
Burnham v. Burnham 119 W. 509 - - - - - - - 482
——— v. Fond du Lac 15 W. 193 - - - - - - 73
Burroughs v. State M. L. A. Co. 97 Mass. 359 - - - - 184
Bursinger v. Bank of Watertown 67 W. 75 - 187, 188, 199
Burton v. U. S. 196 U. S. 283, 25 Sup. Ct. 243 - - 77, 618
Bush v. State *ex rel.* Boyle 100 W. 549 - - - - - - 549
Butler v. Wagner 35 W. 54 - 466
Butte, A. & P. R. Co. v. M. U. R. Co. 16 Mont. 504 - - 503
Buttles v. De Baun 116 W. 323 588

Caldwell v. North Carolina 187 U. S. 622 - - - - - 475
Canterbury v. N. W. Mut. L. Ins. Co. 124 W. 169 - - 225
Carberry v. German Ins. Co. 86 W. 323 - - - - - 41
Carpenter v. Reynolds 58 W. 666 - - - - - - 431
Carroll v. C., B. & N. R. Co. 99 W. 399 - - - - - 246
Carroll, Will of, 53 W. 228 - 546
Case v. Beauregard 99 U. S. 119 - - - - - - 593
Case P. Works v. Niles & S. Co. 107 W. 9 - - - 528
Cavanaugh v. Scott 84 W. 93 41, 42
Central Bank v. Hume 128 U. S. 195 - - - - - 193, 201
Cernahan v. Chrisler 107 W. 645 - - - - - - 570
Chafin Will Case 32 W. 557 - 624, 634
Chicago v. Hasley 25 Ill. 595 70, 73
Chicago & N. W. R. Co. v. O., A. & B. W. R. Co. 107 W. 192 - - - - - - 63
Chicago, B. & N. R. Co. v. Porter 43 Minn. 527 - - 505
Choate v. Arrington 116 Mass. 552 - - - - - - 350

Christianson v. Pioneer F. Co. 92 W. 649 - - - - - 248
Chynoweth v. Tenney 10 W. 397 - - - - - 236–238
City Sav. Bank v. Whittle 63 N. H. 587 - - - - - 193
Clark v. Durand 12 W. 223 189, 195
——— v. Wilkinson 59 W. 543 347, 348
Clemmitt v. N. Y. L. Ins. Co. 76 Va. 355 - - - - - 227
——— v. ——— 77 Va. 366 - 227
Cleveland T. Co. v. Lander 184 U. S. 111 - - - - - 21
Clute v. Carr 20 W. 531 - - 365
Colclough v. Milwaukee 92 W. 182 - - - - - - 149
Cole, Estate of, 102 W. 1 - 546
Collins v. Janesville 117 W. 415 571
——— v. State 25 Tex. Supp. 202 - - - - - - 650
Combs v. Scott 76 W. 662 40, 42
Comm. Nat. Bank v. Smith 107 W. 574 - - - - - 513
Comm'rs v. Citizens' Nat Bank 23 Minn. 280 - - - - 21
Comm. v. Coe 115 Mass. 481 - 618
——— v. Harkins 128 Mass. 79 616
——— v. Harley 7 Met. 462 - 621
——— v. Hill 11 Cush. 137 - 653
——— v. Howe 132 Mass. 250 614, 615, 618
——— v. Karpowski 167 Pa. St. 225 - - - - - 616, 617
——— v. Mead 12 Gray 167 652, 653
——— v. Phillips 16 Pick. 211 647
——— v. Schmunk 207 Pa. St. 544 - - - - 616, 617, 619
——— v. ——— 22 Super. Ct. (Pa.) 348 - - 616, 617, 619
——— v. Taylor 105 Mass. 172 616
——— v. Usner (Pa.) 6 Lanc. Law Rev. 121 - - - 616
——— v. Wood 142 Mass. 459 615, 616, 618, 619, 622
Conkey v. Northern Bank 6 W. 447 - - - - - 606, 607
Conn. Mut. Life Ins. Co. v. Wood 115 Mich. 444 - - 33
Connor v. State 29 Fla. 455 - 619
Connor Co. v. Goodwillie 120 W. 603 - - - - - - 536
Cook v. Corthell 11 R. I. 482 237
Cooke v. State Nat. Bank 52 N. Y. 96 - - - - - 670
Cooper Mfg. Co. v. Ferguson 113 U. S. 727 - - - 476
Corwin, *In re*, 135 N. Y. 245 - 13
Cotter v. Plumer 72 W. 476 - 40
Cousins v. Allen 28 W. 232 - 307
Cragin v. Lovell 88 N. Y. 258 95
Crandon v. Forest Co. 91 W. 239 - - - - - - 34
Cregan v. Marston 126 N. Y. 568 338
Crocker v. Napper 16 L. T. Rep. 295 - - - - - - 567
——— v. State 60 W. 553 - 631
Crowns v. Forest L. Co. 100 W. 554 - - - - - - 482
Crutcher v. Kentucky 141 U. S. 47 - - - - - - - 476
Cummings v. Nat. F. Co. 60 W. 603 - - - - - - 246
Cumps v. Kiyo 104 W. 656 - 231
Cupps v. State 120 W. 504 610, 611
Curran v. A. H. Stange Co. 98 W. 609 - - - - - - 258
——— v. Atkinson 1 Ashm. 51 58
Curry v. Buffalo 135 N. Y. 366 - - - - - - 123
Custin v. Viroqua 67 W. 314 - 242
Cutler v. Howard 9 W. 309 - 671

Dahlke v. Illinois S. Co. 100 W. 431 - - - - - - 338
Dahlman v. Greenwood 99 W. 163 - - - - - - 527
Daly v. Milwaukee 103 W. 588 601
Damkoehler v. Milwaukee 124 W. 144 - - - - - 168
Danforth v. Oshkosh 119 W. 262 - - - - - - 190
Dannhauser v. Wallenstein 169 N. Y. 199 - - - - - 183
Darcey v. Farmers' L. Co. 87 W. 245 - - - - - 413
——— v. ——— 91 W. 654 - 413
——— v. ——— 98 W. 573 - 413
Davenport v. Peoria M. & F. Ins. Co. 17 Iowa 276 - - 69
Davis v. Brown 159 Ind. 644 187, 200
Day v. Conn. G. L. Ins. Co. 45 Conn. 480 - - - - - 226
Deisenrieter v. Kraus-Merkel M. Co. 97 W. 279 - - 413
Delong v. Delong 56 W. 514 - 299
Deobold v. Opperman 111 N. Y. 531 - - - - - 285
Derse v. Derse 103 W. 113 - 113
Dewald v. Dewald 89 W. 353 431
Dexter v. Cole 6 W. 319 - 570
Dietz v. Neenah 91 W. 422 - 268
Dodge Co v. Diers 95 N. W. 602 - - - - - - 405
Donges, Estate of, 103 W. 497 546
Dorne v. Southwork Mfg. Co. 11 Cush. 205 - - - 249

Dowagiac Mfg. Co. v. Schroeder 108 W. 109 - - - 541
Dowling v. Fire Asso. 102 W. 383 - - - - - - 546
Doyle v. Gill 59 W. 518 - - 405
Drummond v. Eau Claire 85 W. 556 - - - - - 168
Duecker v. Goeres 104 W. 29 - 232
Dugal v. Chippewa Falls 101 W. 533 - - - - - - 437
Duinneen v. Rich 22 W. 550 - 365
Dunbar v. Lindsay 119 W. 239 308, 309, 311, 312
Dunham v. Converse 28 W. 306 - - - - - - 570
Dunning v. Ocean Nat. Bank 61 N. Y. 497 - - - 589
Durkee v. Kenosha 59 W. 123 149
Dutcher v. Dutcher 39 W. 666 672
Dyke v. Whyte 17 Colo. 296 33

Eadie v. Slimmon 26 N. Y. 9 182–4, 186–188, 194, 208–210, 212, 215
Ean v. C., M. & St. P. R. Co. 95 W. 69 - - - - 90, 381
——— v. ——— 101 W. 170 - 482
Eaton v. Lyman 33 W. 34 307, 309
Edgerton T. M. Co. v. Croft 69 W. 256 - - - - - 193
Eggett v. Allen 106 W. 633 - 520
Ellenwood v. Marietta C. Co. 158 U. S. 105 - - - 232
Ellington v. Beaver Dam L. Co. 93 Ga. 53 - - - 64
Ellison v. Straw 116 W. 207 - 169, 189, 191, 193–198, 211, 214–219
Emery v. State 101 W. 627 - 256, 263, 610
Everett v. C. R. & M. R. Co. 28 Iowa 417 - - - 58
Excelsior W. M. Co. v. Messinger 116 W. 549 - - 319

Falkner v. Guild 10 W. 563 - 118
Falvey v. O'Brien 17 W. 188 - 462
Farley v. Union M. L. Ins. Co. 41 Hun 304 - - - 228
Farmers' L. & T. Co. v. Comm. Bank 11 W. 207 - - - 237
Felt v. Felt 19 W. 193 - - 578
Fenton v. People 4 Hill 126 - 617
Ferris v. Kilmer 48 N. Y. 300 - - - - - - 327
Fertig v. State 100 W. 301 - 144
First Nat. Bank v. Nat. B. Bank 156 N. Y. 459 - - 285
——— v. Wood 26 W. 500 - 124
Fitzpatrick v. Welch 174 Mass. 486 - - - - - - 366
Flannigan v. Lindgren 102 W. 445 - - - - - - 431
Fletcher v. Ingram 46 W. 191 532
Flora v. Naney 136 Ill. 45 - 69
Fogg v. Child 13 Barb. 246 - 249
Foley v. Jersey City E. L. Co. 54 N. J. Law 411 - - 561
Ford v. C. & N. W. R. Co. 14 W. 609 - - - - - 499
Foss v. Bigelow 102 W. 418 - 412
Fossdahl v. State 89 W. 482 - 422
Foster v. Gile 50 W. 603 188, 215
——— v. Hickox 38 W. 408 - 84
Fox v. Martin 104 W. 581 - 284
Franey v. Warner 96 W. 222 39, 40
Freeman v. Engelmann T. Co. 36 W. 571 - - - - 431
French v. Owen 2 W. 250 - 365
Friedrich v. Milwaukee 114 W. 304 - - 160, 162, 168
——— v. ——— 118 W. 254 160, 162
Frith's Case 22 How. St. Tr. 311 - - - - - - 631
Fritts v. Palmer 132 U. S. 282 476
Fryer v. Warne 29 W. 511 - 365
Fuller v. Madison M. Ins. Co. 36 W. 599 - - - - 541
Fuller-Warren Co. v. Shurts 95 W. 606 - - - - 106

Gage v. Allen 89 W. 98 - - 242
Gager v. Marsden 101 W. 598 392
——— v. Paul 111 W. 638 - 587
Galliher v. Cadwell 145 U. S. 368 - - - - - - 43
Ganson v. Madigan 9 W. 146 - 319
Gates v. Paul 117 W. 170 39, 40
Geer v. Connecticut 161 U. S. 519 - - - - 419, 421
German Am. S. Bank v. Fritz 68 W. 390 - - - - 119
Gerrard v. La Crosse C. R. Co. 113 W. 258 - - - - 600
Gianella v. Bigelow 96 W. 185 587
Gifford v. Hardell 88 W. 538 - 77
Gilbert v. Dutruit 91 W. 661 122, 123
Gill v. Appanoose Co. 68 Iowa 20 - - - - - - - 405
——— v. Benjamin 64 W. 362 532
Gilman v. Contra Costa Co. 8 Cal. 52 - - - - - - 69
Given v. Wis. O. F. M. L. Ins. Co. 71 W. 547 - - - 188
Glanz v. Gloeckler 104 Ill. 573 193, 201, 202
Gleason v. South Mil. Nat. Bank 89 W. 534 - - - - 525
Glendale I. Asso. v. Harvey L. Co. 114 W. 408 - - 50

Glocke v. Glocke 113 W. 303 299, 300, 301
Glover v. State 109 Ind. 391 - 651
Godfrey v. Thornton 46 W. 677 84
Golder v. Littlejohn 30 W. 344 113
Gore v. Brucker 94 W. 65 - 525
Gores v. Graff 77 W. 174 - 258
Gould v. Emerson 99 Mass. 154 197
Grab, *In re*, 157 N. Y. 69 - - 264
Graham v. People 181 Ill. 477 619
Grams v. C. Reiss C. Co. 125 W. 1 - - - - - - 338
Grange v. Reigh 93 W. 552 - 77
Greeff v. Equitable L. A. Soc. 160 N. Y. 19 - - - 667
Green v. Batson 71 W. 54 - 542
——— v. Russell 132 Mass. 536 119
Groth v. Central Verein 95 W. 140 - - - - - - 486
Grove v. Fort Wayne 45 Ind. 429 - - - - - - 362
Grunert v. Spalding 104 W. 193 2
Guinard v. Knapp-Stout & Co. Co. 95 W. 482 - - 4, 259
Gutzman v. Clancy 114 W. 589 386

Hahn v. Doolittle 18 W. 196 - 542
Hall v. Delaplaine 5 W. 206 40, 42
Hallum v. Omro 122 W. 337 - 561
Hamacker v. Comm. Bank 95 W. 359 - - - - - - 21
Hamilton v. Winona S. & L. Co. 95 Mich. 436 - - - 81
Hanlon v. Milwaukee E. R. & L. Co. 118 W. 210 - - 6
Hannibal & St. J. R. Co. v. Shacklett 30 Mo. 550 - - 21
Hansen v. Allen 117 W. 61 - 528
Harrigan v. Gilchrist 121 W. 127 - - - - - 284, 285
Harrington v. Smith 28 W. 43 212
Harris v. Lindsay 4 Wash. C. C. 98 - - - - - - 593
Hart v. W. S. R. Co. 86 W. 489 - - - - - - 247
Harter v. Christoph 32 W. 245 540
Hausmann Bros. Mfg. Co. v. Kempfert 93 W. 587 - - 84
Haven v. Markstrum 67 W. 493 263
Hayward v. Leonard 7 Pick. 181 - - - - - - 109
Hazeltine v. Edgmand 35 Kan. 202 - - - - - - 366
Hazen v. West Superior L. Co. 91 W. 208 - - - - 411
Hazleton v. Union Bank 32 W. 34 - - - - - - 91
Healy, Will of, 108 W. 632 - 546
Heckman v. Swartz 55 W. 173 89
Hennesey v. C. & N. W. R. Co. 99 W. 109 - - - - 437
Herbst v. Lowe 65 W. 316 - 541
Herman v. Oconto 110 W. 660 304
Hermes v. C. & N. W. R. Co. 80 W. 590 - - - - - 248
Hill v. Priestly 52 N. Y. 635 - 543
——— v. State 17 W. 675 - 97
Hillsdale College v. Thomas 40 W. 661 - - - - - 118
Hinsdale v. Miles 5 Conn. 331 78
Hinshaw v. State 147 Ind. 334 654
Hodgerson v. St. L., C. & St. P. R. Co. 160 Ill. 430 - - 505
Hoffman v. State 17 W. 596 - 127
Hogan v. State 30 W. 428 - 131
Hoile v. Bailey 58 W. 434 - 513
Holden v. Curry 85 W. 504 - 346
Hollins v. Johnson 3 Head 346 - - - - - - 58
Hooker v. C., M. & St. P. R. Co. 76 W. 542 - - - - 248
Hooper v. C. & N. W. R. Co. 27 W. 81 - - - - - 6
Hotson v. Wetherby 88 W. 324 - - - - - - 307
Hughes v. W. & St. P. R. Co. 27 Minn. 137 - - - 561
Huling v. Cabell 9 W. Va. 522 - - - - - - 237
Hull v. Brown 35 W. 652 - 515
Humphrey v. Cole 14 Ill. App. 56 - - - - - - 233
Hunt v. Stinson 101 W. 556 307, 309, 311, 312
Hunter v. Bosworth 43 W. 583 237
Hupfer v. Nat. D. Co. 119 W. 417 - - - - - - 248
Hurlbert v. T. D. Kellogg L. & M. Co. 115 W. 225 - - 542
Hussa v. Sikorski 101 W. 131 - 525
Hutson v. Jenson 110 W. 26 285, 350, 351
Hyman v. McVeigh 10 Chi. Leg. News 157 - - - 233

Illinois S. Co. v. Bilot 109 W. 418 - - - - - - 449
Imhoff v. C. & M. R. Co. 20 W. 344 - - - - - - 520
Innes v. Milwaukee 96 W. 174 4
Insurance Cos. v. Weides 14 Wall. 375 - - - - - 99
Irondequoit, Freeholders of, 68 N. Y. 376 - - - - - 264
Iron River v. Bayfield Co. 106 W. 587 - - - - 33, 71
Irvin v. Smith 60 W. 172 - 94
Izer v. State 77 Md. 110 - - 653

Jackson v. State 91 W. 253 - 609
James v. Bowman 190 U. S. 127 - - - - - - 650
Jamison v. State 37 Ark. 445 - 616
Jenkins v. Rock Co. 15 W. 11 147
——— v. State 35 Fla. 737 - 654
Jensen v. Hudson S. Co. 98 W. 73 - - - - - - 4, 414
Jerdee v. State 36 W. 170 - 127
J. I. Case P. Works v. Niles & S. Co. 107 W. 9 - - - 528
Jochem v. Robinson 72 W. 199 5
Johnson v. Nevill 65 N. C. 677 - - - - - - 446
Johnston v. C. Abresch Co. 109 W. 182 - - - - - - 50
Jones v. Alford 98 W. 245 - 527
——— v. Graham 80 W. 6 41, 546
——— v. Jones 66 W. 310 - 113
——— v. ——— 74 N. Y. Supp. 297 - - - - - - 41
——— v. Steamship Cortes 17 Cal. 487 - - - - - 387
Jorgenson v. Superior 111 W. 561 - - - - - - 168
Jutte v. Hughes 67 N. Y. 267 366

Kaples v. Orth 61 W. 533 - 247
Kaukauna E. L. Co. v. Kaukauna 114 W. 327 - - 89
Keep v. Kaufman 56 N. Y. 332 383
Kelley v. Fond du Lac 31 W. 179 - - - - - - 252
Kelley, M. & Co. v. La Crosse C. Co. 120 W. 84 - - - 226
Kent v. Mason 1 Ill. App. 466 99
Kerman v. Howard 23 W. 108 186, 188–190, 197, 198, 200, 201, 207
Kersten v. Milwaukee 106 W. 200 - - 160, 161, 163, 166
Klaise v. State 27 W. 462 466, 578
Klaus, *In re*, 67 W. 401 - - 193
Kliefoth v. N. W. I. Co. 98 W. 495 - - - - - 91, 381
Klochinski v. Shores L. Co. 93 W. 417 - - - - - 338
Knapp v. Heller 32 W. 467 - 58
——— v. Runals 37 W. 135 - 79
Knopf v. Morel 111 Ind. 570 - 119
Knox v. Cleveland 13 W. 245 270
——— v. Knox 59 W. 172 - 113
Koepcke v. Wis. B. & I. Co. 116 W. 92 - - - - - 412
Koepke v. Winterfield 116 W. 44 - - - - - - 382
Koerts v. Grand Lodge 119 W. 520 - - - - - - 486
Kollock v. Stevens Point 37 W. 348 - - - - - 405
Kreider v. Wis. R. P. & P. Co. 110 W. 645 - - - - - 5
Krueger v. Knab 22 W. 429 307, 309–312

LaChapelle v. W. & B. S. Co. 95 W. 518 - - - - - 570
Lackawanna Co. v. First Nat. Bank 94 Pa. St. 221 - - 21
La Crosse Nat. Bank v. Wilson 74 W. 391 - - - - - 527
La Londe v. Barron Co. 80 W. 380 - - - - - - 549
Lamb v. Klaus 30 W. 94 - 5
Lamson v. Moffat 61 W. 153 237, 238
Landis v. Olds 9 Minn. 90 - 41
Larsson v. McClure 95 W. 533 560
Lathrop v. Racine 119 W. 461 163
Laudenschlager v. N. W. E. & L. Asso. 36 Minn. 131 - - 193
Leisy v. Hardin 135 U. S. 100 475
Leonard v. Whitcomb 95 W. 646 - - - - - - 315
Leprell v. Kleinschmidt 112 N. Y. 364 - - - - - 362
Lessel v. Zillmer 105 W. 334 513
Levy v. Wilcox 96 W. 127 - 269
Limited I. Asso. v. Glendale I. Asso. 99 W. 54 - - 50
Linden L. Co. v. Milwaukee E. R. & L. Co. 107 W. 508 - 225
Lipschutz v. Ross 84 N. Y. Supp. 632 - - - - - 562
Little v. Bowers 134 U. S. 547 - - - - - - 242
Lloyd v. Osborne 92 W. 93 - 77
Loennecker's Will 112 W. 461 284
Loeser v. C., M. & St. P. R. Co. 94 W. 571 - - - 315
Look v. Brackett 74 Me. 347 - 528
Lounsbury v. Davis 124 W. 432 601
Lovell v. St. Louis M. L. Ins. Co. 111 U. S. 264 - - - 226
Low v. Howard 10 Cush. 159 - 81
——— v. Pew 108 Mass. 347 - 237
Luce v. Clarke 49 Minn. 356 - 233
Luning v. State 2 Pin. 215 - 601
Lydick v. Holland 83 Mo. 703 293
Lyles v. Cox 10 Lea 738 - 58
Lyng v. Michigan 135 U. S. 161 475

Madden v. Kinney 116 W. 561 190
Madison v. Mayers 97 W. 399 448
Maguire v. Bolen 94 W. 48 - 421
Maitland v. Gilbert P. Co. 97 W. 476 - - - - 438, 601
Malcom v. Rogers 5 Cow. 188 - 672
Mamlock v. Fairbanks 46 W. 415 - - - - - - 541

Manhattan T. Co. v. S. C. C. R. Co. 68 Fed. 82 - - 64
Manitowoc S.B. Works v. M.G. Co. 120 W. 1 100, 104–106, 109
Manning v. School Dist. No. 6 124 W. 84 - - - - - 381
Marchant's Estate, *In re*, 121 W. 526 - - - - - - 118
Market Nat. Bank v. Hogan 21 W. 318 - - - - - - 671
Marsh v. Mitchell 25 W. 706 - 448
Marshall v. Am. Exp. Co. 7 W. 1 - - - - - - 5
Marshall Co. v. Roseau Co. 101 N. W. 164 - - - - - 405
Martin v. Simpson 6 Allen 102 366, 367
Mattoon v. Cowing 13 Gray 387 - - - - - - 350
Maxon v. Gates 112 W. 196 - 536
Maynard v. Greenfield 103 W. 670 - - - - - - 264
Mayor v. Furze 3 Hill 612 - 672
——— v. Root 8 Md. 95 - - 70
McCall v. Moss 112 Ill. 493 - 593
McCall Co. v. Icks 107 W. 232 - - - - - - 528
McCann v. Welch 106 W. 142 42
McConnell v. Hughes 29 W. 537 - - - - - - 532
McCourt v. Eckstein 22 W. 153 362
McCredie v. Senior 4 Paige 378 264
M'Cutchen v. M'Gahay 11 Johns. 281 - - - - - 567
McDermott v. C. & N. W. R. Co. 85 W. 102 - - - 628
McDougall v. Ashland S.-F. Co. 97 W. 382 - - - 414
McElroy v. Minn. P. H. Co. 109 W. 116 - - - - - 536
McIntire v. Pembroke 53 N. H. 462 - - - - - - 405
McKenney v. Minahan 119 W. 651 - - - - - - 588
McLaughlin v. Louisville E. L. Co. 100 Ky. 173 - - 562
McMahon v. Ida M. Co. 95 W. 308 - - - - - - 414
——— v. Snyder 117 W. 463 - 546
McNolty v. School Directors 102 W. 261 - - - - - 405
Mead v. Bagnall 15 W. 156 - 10
Medbury v. Swan 46 N. Y. 200 672
Meeker v. Claghorn 44 N. Y. 349 - - - - - - 327
Meiswinkel v. St. P. F. & M. Ins. Co. 75 W. 147 - - 540
Mendenhall v. Ulrich 101 N. W. 1057 - - - - - 119
Merchants' & M. S. Bank v. Lovejoy 84 W. 601 - 237, 238
Meriwether v. Garrett 102 U. S. 472 - - - - - - 69
Messman v. Ihlenfeldt 89 W. 585 - - - - - - 429
Metropolitan E. R. Co., *In re*, 12 N. Y. Supp. 506 - - 505
Metropolitan L. Ins. Co. v. O'Brien 92 Mich. 584 - 187, 200
Metropolitan T. Co., *In re*, 111 N. Y. 588 - - - - - 506
Meyer v. Metzler 51 Cal. 142 - 362
Miles v. Mut. R. F. L. Asso. 108 W. 421 - - - 92, 381
Millard v. Brayton 177 Mass. 533 - - - - - - 185
Milledge v. Coleman 47 W. 184 307
Miller v. Bayer 94 W. 123 90, 381
——— v. Crawford Co. 106 W. 210 - - - - - 30, 578
——— v. Tracy 86 W. 330 - 547
Milwaukee Co. v. Hackett 21 W. 613 - - - - - 32
Minor v. Mechanics Bank 1 Pet. 46 - - - 671, 672
Mitchell v. Kilburn 74 N. C. 483 - - - - - - 264
Mobile & G. R. Co. v. A. M. R. Co. 87 Ala. 501 - - 503
Montgomery v. Vickery 110 Ind. 211 - - - - - 119
Moody v. Mack 43 Mo. 210 - 80
Moore v. Comm. 8 Pa. St. 260 616, 617
Morey v. Fish Bros. W. Co. 108 W. 520 - - - - - 587
Morrill v. Mackman 24 Mich. 279 - - - - - - 364
Morrow v. Campbell 30 W. 90 532
Morse v. Gilman 16 W. 504 90, 91, 379, 380
Moulton v. Gage 138 Mass. 390 - - - - - - 561
Moyer v. Koontz 103 W. 22 - 233
Muench v. Heinemann 119 W. 441 - - - - - - 253
Mundt v. S. & F. du L. R. Co. 31 W. 451 - - - - - 122
Murphree v. Mobile 108 Ala. 663 - - - - - - 69
Murphy v. Bolger 60 Vt. 723 - 362
Musbach v. Wis. C. Co. 108 W. 57 - - - - - - 246
Musgrave v. State 133 Ind. 297 621

Nash v. Meggett 89 W. 486 - 546
Nat. Bank v. Comm. 9 Wall. 353 - - - - - 21, 22

Nat. S. Bank v. Hunnewell 124 Mass. 260 - - - 119
Nat. T. Co. v. Gleason 77 N. Y. 400 - - - - - - 50
Naylor v. C. & N. W. R. Co. 53 W. 661 - - - - - 560
Nehrling v. Herold Co. 112 W. 558 - - - - - 97, 99
Nelson v. Harrington 72 W. 597 - - - - - - - 6
——— v. Jacobs 99 W. 547 - 449
Newburgh T. Co. v. Miller 5 Johns. Ch. 101 - - - 672
Newcomb v. Mut. L. Ins. Co. 18 Fed. Cas. 47 - 184, 187, 200
Newell v. People *ex rel.* Phelps 7 N. Y. 9 - - - 122, 123
New Home S. M. Co. v. Simon 107 W. 368 - - - 520
New Jersey R. & T. Co. v. Suydam 17 N. J. Law 69 - 58
New York & N. H. R. Co. v. Schuyler 17 N. Y. 592 383, 385
New York C. & H. R. R. Co., *In re*, 77 N. Y. 248 - - 501
New York M. L. I. Co. v. Armstrong 117 U. S. 591 188, 193, 200
Nichols v. Martin 35 Hun, 168 327
Nickerson v. Russell 172 Mass. 584 - - - - - - - 593
Nobles v. Georgia 168 U. S. 398 631
Noel v. Scoby 2 Heisk. 20 - 58
Norfolk & W. R. Co. v. Sims 191 U. S. 441 - - - - 475
Norris v. Mass. M. L. Ins. Co. 131 Mass. 294 - - 184, 192
——— v. State 25 Ohio St. 217 622
North v. Wendell 22 W. 431 - 307, 309–312
Northern T. Co. v. Snyder 113 W. 516 - - - 30, 578
Norton v. Peck 3 W. 714 - 167
Norwood v. Baker 172 U. S. 269 - - - - - - - 163
Nutting v. Minn. F. Ins. Co. 98 W. 26 - - - - - 118
Nys v. Biemeret 44 W. 104 446, 448

O'Brien v. St. Paul 25 Minn. 331 - - - - - - - 152
O'Donnell v. Lewis 104 Ill. App. 198 - - - - - 233
Ogden v. Glidden 9 W. 46 - 122
Okonski v. Penn. & O. F. Co. 114 W. 448 - - - - - 338
Oleson v. Tolford 37 W. 327 - 601
Opitz v. Karel 118 W. 527 - 547
Orton v. Noonan 25 W. 672 - 307
Oshkosh v. Schwartz 55 W. 483 465
Oshkosh City R. Co. v. Winnebago Co. 89 W. 435 - - 268
Outagamie Co. v. Greenville 77 W. 165 - - - 25, 28, 578
Owen v. State 12 W. 559 - - 127

Packard v. Smith 9 W. 184 - 400
Park v. M., St. P. & S. S. M. R. Co. 114 W. 347 - - 293
Parr v. N. E. Mfg. Co. 117 W. 278 - - - - - - 102
Patten P. Co. v. Green Bay & M. C. Co. 93 W. 283 - - 482
Paul v. Virginia 8 Wall. 168 474, 668
Paulson v. State 118 W. 89 139, 422
Pautz v. Plankinton P. Co. 118 W. 47 - - - - - 412, 413
Pearsall v. G. N. R. Co. 161 U. S. 646 - - - - - 193
Pelitier v. C., St. P., M. & O. R. Co. 88 W. 521 - - - 258
Pennoyer v. Neff 95 U. S. 714 - - - - - - - 233
People v. Ah Ying 42 Cal. 18 631
——— v. Empire M. L. Ins. Co. 92 N. Y. 105 - - - - - 228
——— v. Farrell 31 Cal. 576 - 631
——— v. Fish 4 Parker Crim. R. (N. Y.) 206 - - - 620
——— v. Haynes 14 Wend. 546 616
——— v. McGarry 99 N. W. 147 651
——— v. Naughton 38 How. Pr. 430 - - - - - - 653
——— v. Otis 90 N. Y. 48 - 193
——— v. Poucher 30 Hun 576 615
——— v. Roberts 32 App. Div. 113 - - - - - - 18
——— v. Salsbury 134 Mich. 537 - - - - - - - 651
——— v. Security L. Ins. & A. Co. 78 N. Y. 114 - - - 228
People *ex rel.* Comstock v. Syracuse 59 Hun 258 - - - 671
——— Conway v. Livingston Co. 6 Hun 572 - - - 672
——— Davis v. Superior Court 55 Ill. App. 376 - - - 69
Peoria & P. U. R. Co. v. P. & F. R. Co. 105 Ill. 110 - - 505
Perkins v. State 78 W. 551 143, 519
Perry v. State 9 W. 19 - - 606
Peterson v. Sherry L. Co. 90 W. 83 - - - - - - 411
Pettigrew v. Evansville 25 W. 223 - - - - - - 151
Phillip v. Gallant 62 N. Y. 256 109
Phillips v. Thompson 1 Johns. Ch. 331 - - - - - 294
Pike v. Vaughn 39 W. 499 - 532

Planters' Bank v. Sharp 6 How. 301 - - - - - 193
Plumer v. McDonald L. Co. 74 W. 137 - - - - - - 41
Porath v. State 90 W. 527 - 656
Portance v. Lehigh Valley C. Co. 101 W. 574 - - - - 337
Powell v. Ashland I. & S. Co. 98 W. 35 - - - - 412, 560
——— v. St. Croix Co. 46 W. 210 - - - - - - 242
Pratt v. Milwaukee 93 W. 658 269
Pres. etc. of I. & B. R. Co. v. Indianapolis 12 Ind. 620 - 69
Providence & W. R. Co. v. N. & W. R. Co. 138 Mass. 277 - 503
Prybilski v. N. W. C. R. Co. 98 W. 416 - - - - - 4
Putney v. Farnham 27 W. 187 513

Radcliff's Ex'rs v. Mayor 4 N. Y. 195 - - - - - - 152
Rahn v. Milwaukee E. R. & L. Co. 103 W. 467 - 362, 363
Railroad Co. v. Comm'rs 98 U. S. 541 - - - - - - 242
Railroad Cos. v. Gaines 97 U. S. 697 - - - - - - 21
Railway Co. v. Petty 57 Ark. 359 - - - - - - 505
Rains v. Oshkosh 14 W. 372 65, 72
Rasch v. Noth 99 W. 285 362, 363
R. Connor Co. v. Goodwillie 120 W. 603 - - - - - 536
Reg. v. Brady 26 U. C. Q. B. 13 616
——— v. Crosby 1 Cox C. C. 10 - - - - - - 616
——— v. Eagleton 1 Jur. N. s. 940 - - - - - - 616
——— v. Evans L. & C. 252 - 617
——— v. Jones 1 Den. C. C. 551 - - - - - - - 616
——— v. Southey 4 Fost. & F. 864 - - - - - - 630
——— v. Watson D. & B. 348 617
Renne v. U. S. L. Co. 107 W. 305 - - - - - - 571
Rex v. Buttery cited 1 Den. C. C. 551 - - - - - - 619
——— v. Wavell 1 Moody C. C. 224 - - - - - - 616
Reynolds v. Board 33 App. Div. 88, 53 N. Y. Supp. 75 - 671
Rib River L. Co. v. Ogilvie 113 W. 482 - - - - - 319
Rice v. Wilson 129 Mich. 520 347
Richards v. State 82 W. 172 - 519
Richmond v. Smith 117 W. 290 - - - - - - 284
Richter v. Estate of Leiby 101 W. 434 - - - - - - 349
Riggs v. Weise 24 W. 545 - 97
Rindskopf v. State 34 W. 217 127
Robbins v. Shelby Co. 120 U. S. 489 - - - - - - 475
Roberts v. People 9 Colo. 458 622
Robinson v. Duvall 79 Ky. 83 193
——— v. Waupaca 77 W. 544 601
Roe v. Winston 86 Minn. 77 - 64
Rood v. Taft 94 W. 380 - 93–95
Rossmiller v. State 114 W. 169 419
Rothschild v. N. Y. L. Ins. Co. 97 Ill. App. 547 - - 671, 675
Rowell v. Rowell 122 W. 1 - 588
Royce v. Allen 28 Vt. 234 - 326
Rudolf v. Malone 104 W. 470 349, 350
Rutledge v. Price Co. 66 W. 35 242
Ryan v. State 115 W. 488 - 519
Rylander v. Laursen 113 W. 461 - - - - - - 3
——— v. ——— 124 W. 2 - 334

St. Louis, H. & K. C. R. Co. v. H. U. D. Co. 125 Mo. 82 - 497
Sambs v. Stein 53 W. 569 - 589
Sampson v. Mudge 13 Fed. 260 543
Sanderson v. Herman 108 W. 662 - - 160, 161, 163, 166
Sandy v. State 60 Ala. 58 - 616
Sanford v. Sanford 62 N. Y. 553 589
Sanger v. Dun 47 W. 615 - 541
Scandell v. Columbia C. Co. 50 App. Div. 512 - - - - 413
Schaffer v. Cadwallader 36 Pa. St. 126 - - - - - - 69
Schettler v. Jones 20 W. 417 97, 98
Schieve v. State 17 W. 253 - 10
Schintgen v. La Crosse 117 W. 158 - - - - - - 268
Schissler v. State 122 W. 365 - 628
Schleisinger v. State 11 Ohio St. 669 - - - - - - 615
Schollenberger v. Pennsylvania 171 U. S. 1 - - - - 475
Schroeder v. Joliet 189 Ill. 48 152
Schumaker, *In re*, 90 W. 488 - 264
Second Ward S. Bank v. Milwaukee 94 W. 587 - 19, 20, 22
Seiple v. Elizabeth 27 N. J. Law 407 - - - - - - 672
Selleck v. Griswold 49 W. 39 - 94
Sewell v. Eaton 6 W. 490 - 532
Shaw v. Gilbert 111 W. 165 282, 284
Shawmut Nat. Bank v. Manson 168 Mass. 425 - - 77
Shepherd v. Morton-Edgar L. Co. 115 W. 522 - - 413, 414

Sherry v. Frecking 4 Duer 452 362
——— v. Madler 123 W. 621 106, 109
Shipley v. Fifty Associates 106 Mass. 194 - - - - - 366
Shipsey v. Bowery Nat. Bank 59 N. Y. 485 - - - 79
Shook v. Vanmater 22 W. 532 515
Shores L. Co. v. Stitt 102 W. 450 - - - - - - - 6
Sidney S. F. Co. v. Warsaw 122 Pa. St. 494 - - - 249
Singerly v. Thayer 108 Pa. St. 291 - - - - - - 103
Single v. Phelps 20 W. 398 - 237
Sladky v. Marinette L. Co. 107 W. 260 - - - - - 5, 412
Slivitski v. Wien 93 W. 460 - 600
Small v. McGovern 117 W. 608 429
Smeaton v. Martin 57 W. 364 - 167
Smith v. Coleman 77 W. 343 319
——— v. Eau Claire 78 W. 457 149
——— v. Gould 59 W. 641 - 167
——— v. Rockwell 2 Hill 482 78
——— v. Sherry 54 W. 114 269, 270
——— v. Wis. Inv. Co. 114 W. 151 - - - - - - 532
Snyder v. Malone 124 W. 114 59
South Bend C. P. Co. v. Geo. C. Cribb Co. 105 W. 443 - 382
Sowle v. Tomah 81 W. 349 - 123
Speer v. Phœnix M. L. Ins. Co. 36 Hun 322 - - - 228
Speiger v. State 32 W. 400 - 127
Spille v. Wis. B. & I. Co. 105 W. 340 - - - - - 246
Spitz v. Tripp 86 W. 25 - - 527
Springfield v. C. R. R. Co. 4 Cush. 63 - - - - - 503
Staniels v. Raymond 4 Cush. 314 - - - - - - 525
Stannard v. Youmans 100 W. 275 - - - - - - 527
Starr v. C. & A. R. Co. 24 N. J. Law 592 - - - - - 503
State v. Anderson 47 Iowa 142 617
——— v. Arnold 12 Iowa 479 631
——— v. Benner 64 Me. 267 - 653
——— v. Bielby 21 W. 204 646, 647
——— v. Black 75 W. 490 615, 616
——— v. Brooks 99 Mo. 137 - 519
——— v. Butler 178 Mo. 272 - 650
——— v. Cameron 2 Pin. 490 606
——— v. Dale 3 W. 795 - - 647
——— v. Davie 62 W. 305 645, 646
——— v. Davis 41 Iowa 311 - 605
——— v. Dunn 125 Wis. 181 - 655
——— v. Ellis 33 N. J. Law 102 - - - - - - - 651
——— v. Harper 149 Mo. 514 519
State v. Hickam 95 Mo. 322 - 519
——— v. Hobbs 39 Me. 212 - 646
——— v. Hogue 71 W. 390 - 167
——— v. Juneau 88 W. 180 - 656
——— v. Kube 20 W. 217 615, 620
——— v. Lichliter 95 Mo. 402 622
——— v. McChesney 90 Mo. 120 - - - - - - 620
——— v. McGinnis 71 Iowa 685 - - - - - - 617
——— v. Montclair R. Co. 35 N. J. Law 328 - - - 503
——— v. Moore 15 Iowa 412 616, 617
——— v. Palmer 40 Kan. 474 618, 622
——— v. Peacock 50 N. J. Law 84 - - - - - - - 631
——— v. Potts 78 Iowa 656 - 651
——— v. Reed 41 La. Ann. 581 630, 631
——— v. Ryan 34 Wash. 597 - 614
——— v. St. Paul U. D. Co. 42 Minn. 142 - - - 21
——— v. Saunders 19 Kan. 127 419
——— v. Shaeffer 89 Mo. 271 - 618
——— v. Stillman 81 W. 124 580
——— v. Sweetsir 53 Me. 438 672
——— v. Tiedemann 69 Mo. 306 - - - - - - 69
——— v. U. S. Mut. Acc. Asso. 67 W. 629 - - - - - 668
——— v. Woodson 5 Humph. 55 620
State Bank v. Milwaukee 18 W. 281 - - - 18, 20
State *ex rel.* Adams v. Burdge 95 W. 390 - - - - - 464
——— Att'y Gen. v. German Exch. Bank 114 W. 436 - 264
——— Augusta v. Losby 115 W. 57 - - - - - 275
——— Batz v. Lewis 118 W. 432 - - - 19, 21, 22
——— Bell v. City Council 65 Minn. 299 - - - - - 671
——— Burbank v. Superior 81 W. 654 - - - - - - 167
——— Burnett v. Pierpont 29 W. 608 - - - - - - 672
——— De Puy v. Evans 88 W. 255 - - - - - - 647
——— Doerflinger v. Hilmantel 21 W. 566 - - - 122
——— Fenelon v. Graffam 74 W. 643 - - - - - - 81
——— Foster L. Co. v. Williams 123 W. 61 - - 275, 276
——— Giroux v. Lien 112 W. 282 - - - - 8, 12, 13

State *ex rel.* Le Clair v. Wright 80 W. 648 - - - 58, 59, 118
——— Long v. Keyes 75 W. 288 - - - - - - 645
——— McDill v. Board 36 W. 498 - - - - - - 672
——— Moore v. Ashland 88 W. 599 - - - - - 268
——— N. W. Nat. Bank v. Newark 39 N. J. Law 380 - 21
——— Rice v. Chittenden 107 W. 354 - - - - - - 576
——— Schintgen v. La Crosse 101 W. 208 - - - - - 58
——— Vilas v. Wharton 117 W. 558 - - - - 8, 12, 275
Stearns v. Richmond 88 Va. 992 - - - - - - 152
Stedman v. Berlin 97 W. 505 - 304
Stephenson v. Duncan 73 W. 404 - - - - - - 411
Stimson v. M., L. S. & W. R. Co. 75 W. 381 - - - - 248
Stockard v. Morgan 185 U. S. 27 - - - - - - 475
Stoltman v. Lake 124 W. 462 - 578
Strike v. Wis. O. F. M. L. Ins. Co. 95 W. 583 - - 188, 215
Stringham v. Winnebago Co. 24 W. 594 - - - - - 578
Stuart's Will 115 W. 294 - 113
Stubbings v. Dockery 80 W. 618 - - - - - - 97
Sturbridge v. Franklin 160 Mass. 149 - - - - - 567
Sturtevant v. Starin 19 W. 268 · 567
Swan v. Snow 11 Allen 224 - 185
Swarthout v. Swarthout 111 W. 102 - - - - - - 113
Swift v. James 50 W. 540 - 232
Swift & Co. v. Holoubek 65 Neb. 784 - - - - - 413
——— v. ——— 62 Neb. 31 · 413
——— v. U. S. 196 U. S. 375 - 476

Taffe v. State 23 Ark. 34 - 631
Taft v. Quinsigamond Nat. Bank 172 Mass. 363 - - 77
Tanner v. Volentine 75 Ill. 624 365, 366
Taylor v. Carew Mfg. Co. 140 Mass. 150 - - - - - 561
Taylor Orphan Asylum, *In re*, 36 W. 534 - - - - - 285
Tebbetts v. Dowd 23 Wend. 379 79
Teetshorn v. Hull 30 W. 162 - 91
Tennessee v. Whitworth 117 U. S. 129 - - - - 18, 21
Tenney v. Madison 99 W. 539 10
Territory v. Evans 2 Idaho 658 419
Thayer v. Humphrey 91 W. 276 - - - - - 592, 593
Thoemke v. Fiedler 91 W. 386 364, 365
Thomas v. Hatch 53 W. 296 - 104
——— v. Paul 87 W. 607 257, 259
——— v. Steele 22 W. 207 - 570
Thompson v. E. P. Allis Co. 89 W. 523 - - - 414, 561
Thornton v. State 117 W. 338 422
Tobin v. Deal 60 W. 87 - - 570
Toll-Bridge Co. v. Osborn 35 Conn. 7 - - - - - 18
Tompkins v. Fifth Nat. Bank 53 Ill. 57 - - - - - 119
Toplitz v. Bauer 161 N. Y. 325 - - - - - - 228
Tourville v. S. D. Seavey Co. 124 W. 56 - - - - 118
Town v. Gensch 101 W. 445 - 84
Towne v. Salentine 92 W. 404 270
Townley v. C., M. & St. P. R. Co. 53 W. 633 - - - 247
Trowbridge v. Barrett 30 W. 661 104
Troy v. Sargent 132 Mass. 408 184, 192, 197, 200, 216

Underwood v. Waldron 33 Mich. 239 - - - - 366
U. S. v. Boyer 85 Fed. 425 - 650
U. S. Elec. F. A. Co. v. Big Rapids 78 Mich. 67 - - - 103
U. S. *ex rel.* Siegel v. Thoman 156 U. S. 353 - - - - 673
Unity M. L. A. Asso. v. Dugan 118 Mass. 219 - - - 198
Universal L. Ins. Co. v. Binford 76 Va. 109 - - - - 227

Van Allen v. Assessors 3 Wall. 573 - - - - - 21, 22
Van Beck v. Milbrath 118 W. 42 - - - - - - - 541
Vance v. Davis 118 W. 548 - 285
Van den Heuvel v. Nat. F. Co. 84 W. 636 - - - - - 338
Van Valkenburgh v. Hoskins 7 W. 496 - - - - - 536
Voechting v. Grau 55 W. 312 - 94
Vogel v. Melms 31 W. 306 - 515
Vogt v. Schienebeck 122 W. 491 - - - - - - 532
Vrooman v. Jackson 6 Hun 326 362

Walker v. Boone Co. 97 N. W. 1077 - - - - - - 405
——— v. Ontario 111 W. 113 - 600
Walsh v. Fisher 102 W. 172 - 105

Wannamaker v. Burke 111 Pa. St. 423 - - - - - - 561
Wanner v. Wanner 115 W. 196 299
Ward v. C., M. & St. P. R. Co. 102 W. 215 - - - - - 258
——— v. Clark 6 W. 509 - - 400
Ware v. Allen 128 U. S. 590 - 119
Warren v. Union Bank 157 N. Y. 259 - - - - - - 285
Waukesha v. Randles 120 W. 470 - - - - - - 148
Wausau B. Co. v. Dunbar 75 W. 133 - - - - - - 6
Weber v. Illing 66 W. 79 - 319
West v. Wells 54 W. 525 - 326
Western Bank v. Tallman 17 W. 530 - - - - - - 10
Weston v. Richardson 47 L. T. Rep. 514 - - - - - 193
——— v. Weston 46 W. 130 - 84
Wetmore v. Porter 92 N. Y. 76 284
Whipple v. Barnes 21 W. 327 232
Wiesmann v. Brighton 83 W. 550 - - - - - - 547
Wilburn v. Wilburn 83 Ind. 55 193
Wiles v. Suydam 64 N. Y. 173 - - - - - - 384
Wilkins v. Nicolai 99 W. 182 - 449
Williams v. Controllers 18 Pa. St. 275 - - - - - - 69
——— v. Thrall 101 W. 337 - 106
Winona & St. P. R. Co. v. Watertown 4 S. Dak. 323 - 502
Winterfield v. M. & St. P. R. Co. 29 W. 589 - - - 525
Wis. Cent. Co. v. Kneale 79 W. 89 - - - - - 505, 546
Wis. Tel. Co. v. Oshkosh 62 W. 32 - - - - - - 501
Wiswell v. Baxter 20 W. 680 - 232
Wollman v. Ruehle 104 W. 603 449
Wood v. M. & B. R. Co. 68 Ga. 539 - - - - - - 503
Woodbridge v. Bockes 170 N. Y. 596 - - - - - - 284
Woodbury v. Shackleford 19 W. 55 - - - - - - 10
Woodman v. Clapp 21 W. 355 580
Woodward v. Fuller 80 N. Y. 312 - - - - - - 109
Wosbigian v. Washburn & M. Mfg. Co. 167 Mass. 20 - 338
Wright v. Cabot 89 N. Y. 570 327
Wurdemann v. Barnes 92 W. 206 - - - - - - 6

Young v. Blackhawk Co. 66 Iowa 460 - - - - - 405
——— v. French 35 W. 111 - 513
Youtsey v. U. S. 97 Fed. 937, 38 C. C. A. 562 - - - 631

Zander v. Valentine Blatz B. Co. 95 W. 162 - - - 362
Zinc C. Co. v. First Nat. Bank 103 W. 139 - - - - 392

CASES DETERMINED

AT THE

January Term, 1905.

ARNOLD, Respondent, vs. RANDALL, imp., Appellant.

January 10—January 31, 1905.

Res judicata: ***Judgment in another action.***

It having been determined by the judgment in another action between the same parties, and upon the same evidence, that the alleged agreement upon which this action is based was not made, the matter is *res judicata* and that judgment is conclusive in this action.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

This action grows out of the same transaction as that between the same parties passed on by this court and decided February 2, 1904. 121 Wis. 462, 98 N. W. 239. The two actions were, by stipulation, tried together upon the same evidence. The difference consists in that, while the former was based upon the right of the mortgagee, assigned to plaintiff, to recover his unsatisfied debt from the defendant *Randall* by reason of the latter's alleged agreement with Bird to pay the same, this is based upon the fact that Bird had been compelled to pay $350 in discharge of himself from liability upon that mortgage indebtedness, notwithstanding the alleged contract of *Randall* to pay it. Bird assigned such right of action to plaintiff. The court found the facts substantially as in the former action, including a finding and conclusion that

Randall and Gray did assume the mortgage debt, and became liable therefor to the mortgagee, and judgment was rendered in favor of the plaintiff for the $350 paid by Bird to obtain his discharge, with interest and costs, from which judgment defendant *Randall* appeals.

The cause was submitted for the appellant on the brief of *A. C. Titus.*

[No appearance for the respondent.]

DODGE, J. The only cause of action stated in the complaint is predicated upon the existence and breach of an agreement by *Randall* to pay to the mortgagee the amount of his debt, and therefore must fail because, in another action between the same parties, and upon the same evidence (*Arnold v. Randall,* 121 Wis. 462, 98 N. W. 239), it was finally adjudicated that no such promise was made, which is, therefore, *res adjudicata* and conclusive in this action. *Grunert v. Spalding,* 104 Wis. 193, 220, 80 N. W. 589.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment dismissing the complaint.

RYLANDER, Appellant, vs. LAURSEN, Respondent.

January 10—January 31, 1905.

Negligence: Sparks escaping from sawmill: Test of care required: Instructions to jury: Competency of witness as to value.

1. In an action for damages for the destruction of property by fires alleged to have been set by sparks from defendant's sawmill, there being no evidence as to what spark arresters were used by other mill operators, or even that there were any other mills in that locality, it was error to instruct the jury that it was defendant's duty to use such reasonable means and appliances as were commonly and usually used by men engaged in the same or similar business in that locality in preventing fires from escaping from the smokestacks of their mills.

2. Such instruction was inaccurate, also, because giving as a test of defendant's negligence the use of such appliances as are "commonly and usually used by men engaged in the same or similar business," whereas the true test is the use of such appliances as are ordinarily used by men of ordinary care and prudence, or by men generally, engaged in the same or similar business under the same or similar circumstances.
3. In a purely tort action negligence of the defendant in the use of appliances in a dangerous business is not to be tested or measured by the usage of others in the same business in a given small locality.
4. Where there was credible evidence tending to show that a fire set by sparks from defendant's mill had been burning some time on his own premises to the knowledge of his employees, and had been negligently allowed to escape, it was error to charge that if defendant was not negligent in allowing sparks to escape from his smokestack he was not negligent in allowing the fire to escape from him after it was discovered.
5. A witness who testified that he had worked on logs about fifteen winters and knew the value of certain logs was competent, *prima facie*, to testify as to that value, although he had never bought or sold logs himself.

APPEAL from a judgment of the circuit court for Washburn county: A. J. VINJE, Circuit Judge. *Reversed.*

A. L. Bugbee, for the appellant.

For the respondent there was a brief by *Mead & Hoar,* and oral argument by *L. H. Mead.*

WINSLOW, J. This is an action to recover damages for the destruction of a quantity of saw logs and standing timber upon lands of the plaintiff by two separate fires which are alleged to have been set by the negligent escape of sparks from the smokestack of defendant's sawmill located upon adjoining lands. Upon a former appeal in this action a demurrer to a counterclaim set forth in the answer was sustained. See *Rylander v. Laursen,* 113 Wis. 461, 89 N. W. 488, where the substance of the complaint will be found more fully stated. The action has since been tried before a jury, a verdict rendered for the defendant, and from judgment upon the verdict the plaintiff appeals.

The particular negligence alleged and relied on by the plaintiff was in not having a sufficient wire netting or spark arrester at the top of the smokestack of the mill. As to the duty of the defendant in this regard the court charged the jury as follows:

"You are instructed that it was the duty of the defendant in operating his mill to use reasonable care, caution, and prudence in preventing fire escaping from the smokestack of said mill, and that it was his duty to use such reasonable means and appliances as are commonly and usually used by men engaged in the same or similar business in this locality in preventing fires from escaping from the smokestacks of their mills."

Exception was duly taken to the giving of this instruction, and we think rightly, for several plain reasons. In the first place, there was absolutely no evidence in the case as to what appliances in the way of spark arresters were used by other mill operators, nor even that there were any other mills in that locality. This fact alone would be fatal to the instruction, because there is no evidence to which it can apply, and the only way it could be used by the jury would be to draw upon their own knowledge on the point if they had any. This must be error, because the matter is not one of common knowledge.

Further than this, the instruction is inaccurate because it gives as a test the use of such appliances as are "commonly and usually used by men engaged in the same or similar business," whereas the true test is the use of such appliances as are ordinarily used by *men of ordinary care and prudence,* or by men generally, engaged in the same or similar business under the same or similar circumstances. *Guinard v. Knapp-Stout & Co. Co.* 95 Wis. 482, 70 N. W. 671; *Innes v. Milwaukee,* 96 Wis. 174, 70 N. W. 1064; *Jensen v. Hudson S. Co.* 98 Wis. 80, 73 N. W. 434; *Prybilski v. N. W. C. R. Co.* 98 Wis. 416, 74 N. W. 117; *Baxter v. C. & N. W. R. Co.* 104

Wis. 307, 80 N. W. 644; *Sladky v. Marinette L. Co.* 107 Wis. 260, 83 N. W. 514; *Kreider v. Wis. River P. & P. Co.* 110 Wis. 645, 86 N. W. 662; *Boyce v. Wilbur L. Co.* 119 Wis. 642, 97 N. W. 563.

Another feature of the instruction, which, while not fully argued in this case, seems to demand some attention, is that the test to be applied is limited to the usual appliances used by men *in that locality.* As will be seen by reference to the cases last above cited, this court has held that the use of an appliance cannot be called negligent if it be shown to be an appliance ordinarily used by the great majority of men (or, as sometimes expressed, men of ordinary care and prudence, or men generally) engaged in like business under like circumstances. This court has not, so far as we can now ascertain, approved an instruction measuring care in the use of appliances in a dangerous business by the usage of men in a certain small locality, nor can we think that such rule can be safely adopted. Neither do the authorities generally so limit the rule. 1 Thompson, Comm. on Neg. § 31; 4 id. §§ 3769, 3991, 3993, and cases cited.

It is true that, as bearing on the question of defendant's negligence, it has been held that evidence may without error be received of the customary means or appliances used in a certain locality (*Jochem v. Robinson,* 72 Wis. 199, 39 N. W. 383), but this proof is admissible because the evidence of the means used in one locality is a step in the proof of the appliances generally used in many localities. So, when the action is based upon breach of contract, or upon tort arising out of failure to discharge a duty resulting from a contract, local customs or usages, and sometimes even individual customs, may, within certain limits, be proven as tending to show what the contract really was, or upon what the parties in the particular case had the right to depend in their relations with each other. *Marshall v. Am. Exp. Co.* 7 Wis. 1; *Lamb v.*

Klaus, 30 Wis. 94; *Wausau B. Co. v. Dunbar,* 75 Wis. 133, 43 N. W. 739; *Hooper v. C. & N. W. R. Co.* 27 Wis. 81; *Shores L. Co. v. Stitt,* 102 Wis. 450, 78 N. W. 562; 1 Morse, Banks & Banking (4th ed.) § 242. Compare, also, the rule in malpractice actions, where the skill required of a physician is said to be that degree of skill usually exercised by physicians in good standing of the same school of practice in the vicinity. *Nelson v. Harrington,* 72 Wis. 597, 40 N. W. 228; *Wurdemann v. Barnes,* 92 Wis. 206, 66 N. W. 111. Again, where the question is whether the plaintiff has assumed the risk, or has been guilty of any other phase of contributory negligence, the manner in which the opposite party has customarily conducted his business in that regard, if known to the plaintiff, may be shown as a fact having a legitimate bearing upon the quality of the plaintiff's act or failure to act. *Hanlon v. Milwaukee E. R. & L. Co.* 118 Wis. 210, 95 N. W. 100.

It is very apparent, however, that the last two instances of proof of local or individual custom cannot justify a holding that the negligence of the defendant in a purely tort action may be measured by the usage of others in the same business in a given small locality. While the question has not been adequately argued in this case, we feel justified in saying that we see no occasion now to depart from the rule already stated and frequently laid down, to wit, that in such case the defendant's conduct or use of appliances is to be measured by the general conduct or use of people of ordinary care and prudence (or the great majority of people) engaged in the same or similar business under the same or similar circumstances.

In the first cause of action in the present case the defendant was charged with negligence in two respects, viz.: (1) In negligently allowing fire to escape from the smokestack, and (2) in negligently allowing the fire to escape from his own

premises. As to this cause of action the court charged as follows:

"If the defendant did use the ordinary means and ordinary appliances, and was guilty of no negligence in allowing sparks to escape from his smokestack, then, under the evidence in this case as to the first fire, you cannot find defendant guilty of any negligence in allowing the fire to escape from him after it was discovered."

This was error, because there was evidence in the case, which cannot be called incredible, tending to show that the fire had been burning half an hour upon the defendant's own premises and to the knowledge of some of the defendant's employees before any effort was made to put it out; and by the instruction quoted this evidence, which clearly tended to show negligence in allowing the fire to escape, was taken from the consideration of the jury.

A witness called by the plaintiff to prove the value of the logs destroyed by fire testified that he had worked on logs about fifteen winters, and sawed about 150 of the plaintiff's logs which were burned, and knew their value, but that he had never bought or sold logs himself. He was then asked how much the logs which he sawed were worth per thousand, and an objection to the question was sustained on the ground that the witness was not competent to testify. This was error. His testimony that he had worked on logs for many years, knew the logs in question, and knew their value, was enough, *prima facie,* to permit him to testify as to that value. Values may be learned in other ways besides in buying and selling the article itself.

By the Court.—Judgment reversed, and action remanded for a new trial.

STATE EX REL. DEFOREST, Appellant, vs. HOBE, City Clerk, Respondent.

January 10—January 31, 1905.

(1) *Statutes: Construction.* (2, 3) *Taxation: Board of review: Depositions not admissible: Waiver.*

1. Where a general statute covering an entire subject matter is so repugnant to a special statute covering some particular part thereof that effect cannot reasonably be given to both, the latter is to be read as an exception to the former. Thus, sec. 1061, Stats. 1898, relating to the manner of making proof before a board of review, must be considered as making an exception to the general statute (sec. 4086) as to depositions.
2. Under sec. 1061, Stats. 1898, a board of review is to take evidence by the examination of witnesses who appear before it, and in no other way. Depositions, even of nonresident property owners, cannot be considered. *State ex rel. Giroux v. Lien*, 112 Wis. 282, affirmed; *State ex rel. Vilas v. Wharton*, 117 Wis. 558, explained.
3. A board of review cannot waive the requirements of sec. 1061, Stats. 1898, as to the taking of evidence before it.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

Appellant sued out a writ of *certiorari* to obtain a review by the circuit court for Douglas county of the proceedings of the board of review of the city of Superior in such county, respecting the assessment of his property. By the petition for and the return to the writ these facts appeared:

Appellant in 1903 owned 444 2–3 shares of the capital stock of the First National Bank of the city of Superior. He was a resident of the state of New York. In due time the proper officers of said city assessed said stock to him at the par value thereof. Thereafter he made an affidavit before a notary public in New York to the effect that his *bona fide* indebtedness for each and every month for the year prior to May 1, 1903, exceeded all moneys and debts due him, includ-

ing such stock, other than United States bonds and securities not taxable. Such affidavit was filed with the assessing officers, but they, nevertheless, completed their roll ready for the board of review without making any change in the assessment of appellant's property. In due time he objected to such assessment before said board, and by his agent filed with such board in support of such objection his deposition taken in New York on due notice to the city as in case of a deposition for use in a judicial proceeding, in which he testified that the amount monthly of moneys and debts due him for the year ending May 1, 1903, did not exceed $100,000 and that the average amount of his indebtedness during the said year for each and every month thereof exceeded $150,000, and exceeded all moneys and debts due or to become due to him, other than United States bonds and securities not taxable, including the full value of the aforesaid stock. In addition to the deposition, appellant's agent presented to the board of review, in support of the objection aforesaid, the affidavit filed with the assessing officers, the affidavit of the cashier of the bank, showing the distribution of the capital stock thereof, residence of the several stockholders, and the par value of the stock. The board, nevertheless, on such evidence overruled appellant's objection and confirmed the assessment of his property as made by the assessing officers.

Upon the writ and the return thereto respondent moved to quash the writ and the motion was granted, whereupon judgment was rendered accordingly.

For the appellant there was a brief by *Luse, Powell, deForest & Luse,* and oral argument by *L. K. Luse.*

Thomas E. Lyons, for the respondent.

MARSHALL, J. The first proposition submitted is that the board of review committed jurisdictional error in refusing to consider and give weight to appellant's deposition. Sec. 4086, Stats. 1898, is referred to as authorizing proof to be made in

that way, as to any matter material to be established before any tribunal created by law. That is the general statute on the subject of depositions, and is as follows:

"Depositions may be taken in the manner and according to the regulations provided in this chapter to be used before any court, including the supreme court, magistrate or any other person authorized to examine witnesses or hear testimony in any action or proceeding or any motion therein, or in any civil matter or proceeding. In all criminal or quasi-criminal cases in courts of record the defendant, on notice to the district attorney, may apply to the court or the presiding judge thereof for leave to take the deposition of any material witness within the state who is in imminent danger of death or who is without the state; and if it appears to the satisfaction of the court or judge that due diligence has been used in making such application, that such witness is material, and is in such danger or without the state and that his attendance cannot, by the use of due diligence, be procured upon the trial, such leave may be granted; and such court or judge shall determine whether such deposition be taken on verbal or written interrogatories and cross-interrogatories, and the same when so taken may be used on the trial in the same manner as in civil cases."

We need not stop to inquire whether that language viewed by itself includes the use of depositions before equalizing boards, if the manner of making proof before such tribunals is expressly, or by necessary implication, pointed out by a statute so inconsistent therewith that one must yield to the other. There is no more familiar rule for statutory construction than that in case of a general statute covering an entire subject matter which is so repugnant to a special statute covering some particular part thereof that effect cannot reasonably be given to both, the latter is to be read as an exception to the former. *Mead v. Bagnall,* 15 Wis. 156; *Woodbury v. Shackleford,* 19 Wis. 55; *Schieve v. State,* 17 Wis. 253; *Western Bank v. Tallman,* 17 Wis. 530; *Tenney v. Madison,* 99 Wis. 539, 75 N. W. 979.

Sec. 1061, Stats. 1898, regulates the manner of producing proof before boards for the equalizing of assessment of property for taxation. The language thereof is as follows:

"They are hereby required to hear and examine any person or persons upon oath who shall appear before them in relation to the assessment of any property upon said roll. . . . Any person who thinks the aggregate valuation of his personal property by the assessor too high may appear and state to the board under oath the true aggregate valuation of all personal property upon which he is liable to taxation, and if the board shall be satisfied of the truth of such statement they shall take the valuation so fixed by him as the true aggregate valuation of his personal property. The board of review shall, when satisfied from the evidence taken that the assessor's valuation is too high or too low, lower or raise the same accordingly, whether the person assessed appear before them or not. . . . Any person claiming any correction of the assessment may call witnesses to support the same or to show that any property on the roll is assessed too high or too low, and the attendance of witnesses may be compelled. . . . The clerk shall . . . reduce to writing and preserve the examination and statements of every person and witness taken by the board."

It is not considered that the amendment thereto, ch. 284, Laws of 1903, changed the rule of evidence as it stood before. It only provides that the property owner may file his objections by an agent. The manner of producing evidence to support them is not referred to.

It will be easily seen that the language last quoted, at every point where the matter is referred to, plainly suggests the taking of evidence by the examination of witnesses before the equalizing board and in no other manner. The board is required "to examine any person or persons upon oath who shall appear before them." "Any person . . . may appear and state to the board upon oath," etc. The board is required to act upon "the evidence taken," plainly referring back to the language particularly noted. The clerk is required to "reduce to writing . . . the examination and statements of every

person and witness taken by the board," plainly again referring back to the method aforesaid of making proof. As an original proposition we could not escape the conclusion that such method so plainly pointed out is exclusive.

True, as counsel suggests, the foreign taxpayer under such a construction of the statute, as above indicated, may be put to some disadvantage as compared with resident taxpayers. But if the statute plainly requires the personal attendance of a witness before the board as a condition of his evidence being received, as to us it seems to do, the court cannot add to it or take therefrom. Probably the legislature in providing, as indicated, appreciated that the law permitting the taking of depositions in the ordinary way for use before equalizing boards might render it necessary for a municipality in order to protect the public interests to incur large and burdensome expenses for services of attorneys to attend upon the examination of witnesses in foreign jurisdictions, and that the proceedings in that regard might require so much time as to preclude the carrying out of the statutory scheme for the completion of the assessment roll in a short period after its coming before the equalizing board. This agrees with views expressed in *State ex rel. Giroux v. Lien,* 112 Wis. 282, 87 N. W. 1113. We are strongly urged to modify, or limit, or perhaps overrule that case, but upon full consideration of the matter we are convinced that the intent of the legislature was there correctly declared. The statute contemplates the taking of evidence before the board of review, and in that manner only, affording it an opportunity to interrogate the witnesses. That is in harmony with the requirement that the affidavit to be given by the property owner to the assessor must be sworn to before the latter.

Our attention is called to *State ex rel. Vilas v. Wharton,* 117 Wis. 558, 94 N. W. 359, as modifying the *Giroux Case.* We do not so regard it. There the agent of the property owner was personally examined before the board of review

on oath and offered in connection with his evidence some documents which were verified by him and tended to establish the facts in controversy. If the papers, independently of the evidence of the witness, had been offered as part of a deposition it might well be said that the circumstances were out of harmony with what was said in the *Giroux Case.*

It is further suggested that since an affidavit in the form required by sec. 1056, Stats. 1898, and the deposition were received by the board without objection, compliance with the statute as to personal appearance before the board, if that were required, was waived. *In re Corwin,* 135 N. Y. 245, 32 N. E. 16, is confidently referred to in support of that. The affidavit said to be such as is required by sec. 1056 was not so in fact, because it was not sworn to before the assessor. It was a sworn statement not authorized to be used either before the assessor or the board of review.

Had the board jurisdiction to waive the statutory method for making proof before it? It seems not. If *In re Corwin, supra,* were to the contrary under similar circumstances, we should not be inclined to follow it. The point there involved was whether the board of assessors had jurisdiction to act upon evidence of the property owner's agent, who appeared in his behalf and admitted all facts material for the board to know. True, in leading up to the final conclusion the justice who wrote the opinion said in effect *arguendo* that where facts essential to the interests of a property owner can only be established by evidence, and his "personal appearance is impracticable . . . the taxpayer cannot be denied the opportunity to present his grievance by attorney, with proofs to support it," and where, when proof is offered other than by personal attendance of witnesses before the board, it is received and such attendance is not demanded, it might well be held that any objection thereto that might have been made was waived. The court, however, was not in the discussion treating of rights other than those given by the particular statute

under consideration. There is nothing in the decision, which we can discover, to the effect that where a statute plainly requires the board of review to decide upon evidence of witnesses taken before it and reduced to writing by its clerk, it can waive that method or that the statute can be in any way evaded.

Referring to the New York statute which the court had under consideration, as above, sec. 5, tit. 4, ch. 535, Laws of 1888, we find that it left the whole subject of procedure in discovering the facts necessary to correctly determine the proper valuation of property to the discretion of the board. The power was conferred in this broad language:

"Upon such review the said board of assessors, as a board, shall have power to correct, alter, amend, subtract from and add to such assessment roll of said city, in such manner as in their judgment may be proper."

The court might well have held, under such unlimited authority, the board could in its discretion require the personal appearance of the property owner or not as it saw fit, not transcending the boundaries of sound discretion, and that if it acted in a manner indicating that such appearance would not be required, it would be deemed waived.

The foregoing renders it unnecessary to consider any other question presented on this appeal. It appearing that there was no evidence before the board upon which they could legitimately grant the request of appellant to change the assessment of his property made by the assessor, it had no other course to pursue than to deny such request.

By the Court.—The judgment is affirmed.

FIRST NATIONAL BANK OF THE CITY OF SUPERIOR, Appellant, vs. DOUGLAS COUNTY, imp., Respondent.

January 10—January 31, 1905.

Taxation: Double taxation: Exemptions: "Capital" of bank: Property purchased with capital: Voluntary payment: Purchase of void tax certificate through attorney: Return of money paid: Counties.

1. Intent to impose taxation which is double even from an economic viewpoint is not to be ascribed to legislation in absence of clear and unambiguous expression.
2. The word "capital" as used in sec. 1, ch. 102, Laws of 1866 (Stats. 1898, p. 1527),—providing that no tax shall be imposed upon the capital of any bank or banking association,—means the money or property which the incorporators contribute and transfer to the corporation as capital, and which thus becomes its property; and the exemption includes the specific property purchased with money contributed as capital.
3. The burden is upon the bank to prove clearly the exempt character of the property, and to show an appropriation of the very capital to its purchase, not merely purchase out of the general funds made up of deposits, surplus, and capital commixed.
4. The fact that the assessors, in estimating the value of the shares of capital stock of a bank, did not include the value of certain real estate owned by it, and so fixed their value at less than the true value, does not preclude the bank from insisting that such real estate is exempt from taxation.
5. An agreement by an attorney of a bank to purchase at a tax sale, with his own money, real property of the bank which it claims is exempt, and to hold the certificate of sale subject to the future desire of the bank to acquire it in case it should be adjudged valid, is not fraudulent or illegal, nor does such a purchase amount to a voluntary payment of the tax by the bank which would preclude it from suing to have the certificate declared void.
6. The facts that an attorney for a bank borrowed from the bank on his note a sum sufficient to purchase a tax certificate on real property of the bank and requested another person to take and hold the certificate subject to his directions, and it was so purchased, do not show that the certificate was purchased by, or held in trust for, the bank.

7. If such tax certificate is adjudged void in an action by the bank against the county and the purchaser, the latter, by virtue of his legal title, has a right, as against the county, to a return of the money paid for the certificate.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

Plaintiff is a national banking association, located at the city of Superior. It owned a three-story brick building, the first floor of which was occupied for its banking offices and the other portions rented. Its capital stock, at par, was $200,000. In the year 1901 its capital stock was assessed to the owners thereof at Superior at a total of $100,000, and the real estate above described was assessed as the property of the plaintiff, tax levied thereon, and upon delinquency the property was sold at tax sale in May, 1902, and certificate issued in form to Mark Paine. This action was brought alleging the nontaxability of said real estate, and praying the cancellation of said tax certificate. Mark Paine notified the county, and tendered it the defense, which it assumed and became interpleaded to the action. It was claimed that the certificate was in fact purchased by the plaintiff, with its money, and that the certificate belonged to it; hence that, whether the property was taxable or not, the transaction constituted a voluntary payment thereof, and for that reason plaintiff could neither maintain action against Paine to quiet title nor against the county to recover back the amount paid at the sale therefor.

The court found that the real estate was purchased and the building theretofore commenced thereon was completed out of the capital of the plaintiff at a cost of about $49,000; that the plaintiff furnished the money and caused the property to be bid off and the certificate of sale made to Paine, who consented to receive it and has ever since held the same in his possession for the use and benefit of the plaintiff, subject to its control—all for the purpose of avoiding a voluntary pay-

ment or redemption from such tax. Whereupon it found, as conclusions of law, a valid assessment, and that, even if invalid, the purchase by the plaintiff of the tax certificate with full knowledge of all the facts amounted to a voluntary redemption; and that, though neither of the former positions were tenable, still the plaintiff was not entitled to the equitable relief prayed in the complaint, nor could it in this action recover from the county the amount paid for said certificate. Whereupon judgment dismissing the complaint was entered, from which the plaintiff appeals.

For the appellant there was a brief by *Luse, Powell, deForest & Luse,* and oral argument by *L. K. Luse.*

C. H. Crownhart, for the respondent.

DODGE, J. Congress having expressly consented that the states may, if they choose, tax the shares of stock in national banks, with certain limitations, and may also tax the real estate of the banking association (sec. 5219, R. S. of U. S. [U. S. Comp. St. 1901, p. 3502]), the present tax finds no obstacle in the federal origin of the appellant corporation, and we have only to consider whether the law of Wisconsin, as it existed in 1901, authorized it.

Sec. 1034, Stats. 1898, under title XIII, "Taxation," commands that taxes "be levied on all property in this state except such as is exempted therefrom." Confessedly, sec. 1038, Stats. 1898, prescribing exemptions, does not include such property as that now involved. However, in the banking act adopted in 1866 (ch. 102, sec. 1), we find the further provision, "No tax shall hereafter be assessed upon the capital of any bank or banking association organized under the authority of this state," made applicable by sec. 2 to national banks within the state. Here, if anywhere, must be found the exemption claimed by appellant. The question obviously crystallizes into the inquiry whether the capital of a banking as-

sociation, as the word is used in this act, includes the specific property purchased with money contributed as capital.

The words "capital" and "capital stock," often used interchangeably, are found in tax laws to be applied to one or another of three different mental conceptions: first, to the shares or interest which the stockholders have in a corporation; secondly, to the money or property which the incorporators contribute and transfer to the corporation as capital, and which thus becomes its property; and, thirdly, the word is often used as a mere measure of size of the corporation as a test for graduating taxes, usually by way of license. Beyond doubt the word is used in this law in the second sense, for the first is clearly distinguished in the same section by use of the phrase "shares of stock," and the third is obviously not contemplated.

The capital of a corporation is defined as "the funds paid in by the stockholders to be used and managed by the association for banking purposes." *State Bank v. Milwaukee,* 18 Wis. 281, 284. A distinguishing feature is that it becomes the property of the corporation, as differentiated from the component stockholders. It may originally consist of money or specific property, but with banks, as with most other business corporations, money paid in as capital never remains *in specie* for any considerable time. It almost at once becomes converted into some form of property—bonds, securities, or real estate. If, therefore, the exemption of the capital so industriously proclaimed by the law of 1866 was intended to apply only to the specific funds received from the original contributors while retained in the original form, it would be of so slight practical value or importance as to be not worth the effort of enactment. A further consideration, persuasive though not conclusive, is that intent to impose taxation which is double even from an economic viewpoint is not to be ascribed to legislation in absence of clear and unambiguous expression. *People v. Roberts,* 32 App. Div. 113, 52 N. Y. Supp. 859; *Toll-Bridge Co. v. Osborn,* 35 Conn. 7, 20; *Ten-*

nessee v. Whitworth, 117 U. S. 129, 137, 6 Sup. Ct. 645. While it may be conceded that the property of the stockholder in his shares is so legally distinguishable from that of the corporate entity in its specific assets that the legislature might tax both without defiance of any definite constitutional inhibition (*Second Ward S. Bank v. Milwaukee,* 94 Wis. 587, 69 N. W. 359; *State ex rel. Batz v. Lewis,* 118 Wis. 432, 95 N. W. 388), yet, broadly viewed, the value of the stock in the hands of the shareholders includes the net value of all the property which the corporation owns; not only tangible property, but also the franchise and any good will from which results probability of profits. When, as is obviously directed by the bank act, the shares are assessed at their full market value, the government exacts taxes upon everything of value which the corporation owns, and we should naturally expect to find such reciprocal concession as would relieve the property of the bank from a duplication of tax burdens in another form. Especially so when in the case of other corporations careful provision against such result is made by wholly exempting the shares when the corporate assets are taxed. Subd. 9, sec. 1038, Stats. 1898. From these reasons arises much improbability that the word "capital" is used so restrictively as to leave subject to taxation property purchased with that which the incorporators originally contributed.

The probability to the contrary is, however, rendered almost a certainty by examination of the conditions and statutes sought to be modified in 1866. Sec. 20, ch. 71, R. S. 1858, required that every banking association, not the shareholders, should pay one and one half per cent. on the amount at par of its capital stock, and provided that "said capital stock shall be exempt from all other taxes except on that portion of said capital stock which shall consist of and include the real property." "Capital stock" was there used in the same sense as "capital," for the shareholders' interest was discriminated and exempted by another clause. There can, of course, be

no doubt that the expression was there used with intent to include the specific articles of property acquired with the capital, for it was deemed necessary to specify such of that property as it was desired to except from the exemption accorded to capital. Such intent was declared by this court in *State Bank v. Milwaukee,* 18 Wis. 281, where it is said that the exemption was from "local taxation on their property." In this situation came the amendment of 1866, which exempted all the capital, with no exception of that part of it invested in real estate. It is inconceivable that the lawmakers meant the same thing in the latter act as in the former. It is contrary to human experience that in amending an act which exempted "capital except real estate" one should exempt "the capital" with no exception, and mean to continue exactly the same exemption as formerly existed. Reason for increase of the exemption is not wanting. The new law imposed taxes at current rates (generally much in excess of 1½ per cent.) on the full value of the shares of stock itself; also, doubtless, generally in excess of the par value adopted under the earlier law. That full cash value of stock would, as already stated, include the net value of all property which the corporation had, whether acquired with capital, surplus, or deposits, and, in addition, the value of the franchise and good will; hence there was obvious propriety in foregoing attempt to impose tax again on that property *in specie.*

So far as this court has spoken, its utterances tend to confirm exemption of the property of banks acquired with their capital. *State Bank v. Milwaukee, supra,* under the old law, has already been mentioned. In *Second Ward Savings Bank v. Milwaukee,* 94 Wis. 587, 69 N. W. 359, taxability of the plaintiff's real estate was sustained only by holding that it had been acquired with and constituted part of the surplus, apparently conceding that it must be exempt if it represented capital. Again, in *Hamacker v. Commercial Bank,* 95 Wis. 359, 362, 70 N. W. 295, it was said the bank had no personal

property subject to taxation; apparently merely because it had no surplus. In *State ex rel. Batz v. Lewis,* 118 Wis. 432, 95 N. W. 388, the question was not touched; the holding being merely that the shares of capital were taxable to the holders at actual value by clear statutory declaration, whether the realty of the association were taxed or not.

In many other jurisdictions has been declared identity between the capital of a corporation and the specific property into which the money capital had been transformed. The supreme court of the United States has settled for the whole country that an act of Congress exempting United States bonds is disobeyed by a law taxing the capital of a corporation when that capital has become invested in such bonds. *Bank Tax Cases,* 2 Wall. 200; *Van Allen v. Assessors,* 3 Wall. 573; *Nat. Bank v. Comm.* 9 Wall. 353; *Cleveland T. Co. v. Lander,* 184 U. S. 111, 22 Sup. Ct. 394. Other cases of interest are *Tennessee v. Whitworth,* 117 U. S. 129, 6 Sup. Ct. 645; *Railroad Cos. v. Gaines,* 97 U. S. 697, 707; *Lackawanna Co. v. First Nat. Bank,* 94 Pa. St. 221; *Comm'rs v. Citizens' Nat. Bank,* 23 Minn. 280, 288; *Hannibal & St. J. R. Co. v. Shacklett,* 30 Mo. 550; *State, North Ward Nat. Bank v. Newark,* 39 N. J. Law, 380; *State v. St. Paul U. D. Co.* 42 Minn. 142, 43 N. W. 840.

The foregoing considerations constrain us to the conclusion that the legislation in question must be construed as exempting such of the property of a banking association as can be clearly proved to have been acquired with, and to constitute part of, its capital. We appreciate the difficulties that may arise in ascertaining whether given items of personalty or realty have been acquired by investment of the capital as distinguished from the surplus or moneys on deposit; but they are not greater than attend many other questions of fact which are cast upon various tribunals for solution. Doubtless the burden must rest on the association to prove clearly the exempt character of the property, and to show an appro-

priation of the very capital to its purchase, not merely purchase out of its general funds made up of deposits, surplus, and capital commixed. In the present case, however, there is no such difficulty, for the real estate in question is shown without doubt to have been purchased with the original capital at the very inception of the plaintiff association. We therefore conclude that by express statute it was exempt from taxation for 1901, and that the tax levied was void.

Respondents further urge that, although the tax in question be invalid, plaintiff cannot be heard to complain because, as they assert, the assessors valued the shares of capital stock which were assessed to the owners thereof for the year 1901 at less than their true value, and in estimating their value did not include the real estate in question. It is certainly too late at the present time to try the validity or correctness of an assessment upon other property to other owners; nor is such fact at all relevant to plaintiff's contention. It is thoroughly established that the stockholders, as individuals, are different entities, for the purposes of taxation, from the corporation in which they hold stock, and that their stock interest therein is a wholly distinct property from either the capital owned by the bank or any other of its property. *Second Ward S. Bank v. Milwaukee,* 94 Wis. 587, 69 N. W. 359; *State ex rel. Batz v. Lewis,* 118 Wis. 432, 95 N. W. 388; *Van Allen v. Assessors,* 3 Wall. 573; *Nat. Bank v. Comm.* 9 Wall. 353. The plaintiff corporation has a right to insist that its exempt property shall not be taxed, whether other property owned by other people has been sufficiently or insufficiently taxed.

It is still further urged by respondents that, in effect, the bank itself purchased this certificate, and that this action cannot be maintained, because it is established that Mark Paine, who nominally holds it, holds subject to the direction of the bank, and no decree of a court of equity is necessary to cancel his rights, and because, in purchasing the certificate, the bank, in effect, paid its tax voluntarily and cannot now sustain the

right which Mark Paine, if a *bona fide* owner, would have to demand repayment from the county upon the establishment of the invalidity of the tax. We need not discuss the legal questions thus raised, as we do not find any evidence to sustain the view that the bank, either technically or in effect, was the purchaser of this certificate. It may be conceded that Mark Paine has none but a dry legal title thereto, resulting from its issue to him; but there is no evidence that such title is held for the benefit of the bank. The only proof on the subject is that Mr. Luse, one of the attorneys for the bank, and doubtless acting for its welfare—for the purpose, as he stated, of preventing injury to its credit from the ownership of a tax certificate by persons adverse or antagonistic to the bank,—borrowed from the bank, upon his promissory note, a sum sufficient to buy this certificate, directed his partner, Mr. Powell, to request Mr. Paine to take and hold the certificate subject to his directions, and it was so purchased. If Mr. Paine holds in trust for any one, apparently Mr. Luse is the person. Now, there was not a word of evidence that there was any agreement by the bank with Mr. Luse to surrender up his note upon the turning over of the certificate to it, nor any agreement on the part of Mr. Luse to so turn it over. An agreement on his part to purchase the certificate with his own money, and to hold it subject to the future desire of the bank to acquire it in case it should be adjudged valid, contains nothing of illegality. There is no question of fraud involved at all. If the certificate is void, the county is not entitled to the money upon it, and no injury or fraud could be done to the county by an arrangement of that sort; hence whatever arrangement the parties saw fit to make was beyond assault or question by the county. Not even is the county affected by those considerations which warrant the refusal to allow the recovery back of voluntarily paid taxes; for, when that occurs, the municipality has a right to assume that the money is paid finally, and to proceed to expend the

same for its municipal purposes; and serious injury and embarrassment might well result from its being afterward required to pay it back. For these reasons we conclude, as above stated, that it is not established that the bank is the owner of this certificate or has a right to acquire it without paying for it.

The property being exempt, the tax laid upon it, as also the tax certificate, is void, and plaintiff has a right to judgment to that effect. Also, as against the county, Mark Paine has right to return of the money paid for the certificate by virtue of his legal title thereto. Whether by reason of some trust he may be accountable to Mr. Luse for that money, is wholly immaterial.

By the Court.—Judgment reversed, and cause remanded with directions to render judgment in accordance with the prayer of the complaint.

TOWN OF SPOONER, Respondent, vs. WASHBURN COUNTY, Appellant.

January 11—January 31, 1905.

Taxation: Collection of delinquent taxes: Accounting between county and town: Power of county board: Supervisor as representative of town: Amount due the county: Taking of tax deeds: Compromise of taxes: Invalid taxes: Costs of action: Interest.

1. A county board cannot, by a mere resolution instructing the treasurer to balance all accounts between the county and the several towns therein, settle or discharge the claim of a town for money collected by the county for delinquent taxes.
2. To give the county board jurisdiction of such a matter, a claim in appropriate form must be presented on behalf of a town, and the town must be given an opportunity of prosecuting its demand and of taking an appeal from a decision adverse to it.
3. The supervisor from a town, while acting in his capacity as a member of the county board, cannot be deemed to represent or

stand in the place of the town in a capacity adverse to the county. *Outagamie Co. v. Greenville*, 77 Wis. 165, distinguished, and language used therein disapproved.

4. The amount "due the county for unpaid county taxes," within the meaning of sec. 1114, Stats. 1898, is the sum which equals in amount the county tax, with interest allowed thereon by statute, and all the fixed charges and necessary expenses allowed by law, including those incurred by the county for illegal assessments embraced in the delinquent return, and the five per cent. collection fees on all amounts actually collected by the county; and all sums collected on delinquent taxes in excess of said amount belong, with the interest and charges thereon, to the town, city, or village from which such taxes were returned as delinquent.

5. Though the purchase of land by the county at a tax sale is not a collection of the tax within the meaning of sec. 1114, Stats. 1898, yet the taking of a tax deed, vesting the title in the county and giving it full power of disposition, is such collection, and the county is chargeable in such a case with the redemption value of the tax certificate at the time the deed was executed, and for the redemption value of outstanding tax certificates on the land, as well as all subsequent taxes remaining unpaid which were levied while the county owned the land.

6. Where the county board, without authority of law, and not under secs. 1155, 1184, or 1210*g*, Stats. 1898, "compromised" or "canceled" unpaid delinquent taxes or ordered that outstanding certificates be transferred at less than their face value, the county is chargeable with the face value of the tax, interest, and charges up to the date of such compromise, cancellation, or transfer.

7. Where a town returned as delinquent certain taxes on railroad lands, and in an action by the railroad company such taxes were declared void, the costs for which judgment was rendered against the county in such action were a necessary expense for which it should be reimbursed out of moneys collected on the delinquent return of the town.

8. The account between a county and a town in respect to delinquent taxes collected by the county is analogous to an open account between persons, and the county is liable for interest on any amount due the town only after failure, upon due demand, to pay the same.

APPEAL from a judgment of the circuit court for Washburn county: A. J. VINJE, Circuit Judge. *Reversed.*

This is an action by the town of *Spooner* against *Wash-*

burn county to recover on account of collections on delinquent taxes returned by the town to the county. The town filed its claim with the clerk of defendant, demanding payment of the amount due it from the county for collections of delinquent taxes in excess of the amount due thereon to the county. The claim was presented to the county board of supervisors on March 15, 1900, and was on this day wholly disallowed by them. The town duly appealed from such action of the board to the circuit court for *Washburn* county.

While the action was pending in circuit court it was referred to T. H. Woolford, an officer of the court, to hear, try, and determine the issues. In the proceedings taken before the referee the complaint was amended and issue joined thereon. The answer set up a resolution of the county board of December 28, 1898, which was recorded as follows:

"Motion made and carried that the county treasurer be and is hereby instructed to balance all accounts as between the several towns and the county up to and including Dec. 31st, 1898. Recorded vote unanimous."

Upon the evidence adduced before the referee, the court directed a modification of the report and findings of the referee. The court found and determined that plaintiff was a duly organized town, and defendant a duly organized county; that the county from 1890 to 1898 inclusive, annually, duly levied taxes against the town of *Spooner* in the sums specified; and that the town duly levied the same upon all of the taxable property of the town. The findings specify the various sums of money paid to the town by the county throughout the period of these transactions, and the sums of money paid by the town to the county as state and county taxes. The amount of delinquent taxes, exclusive of fees, returned annually by the town to the county on real estate and personal property, is found in gross amounts, and the collections thereon by the county, exclusive of fees or interest; such sums embracing whatever was collected in cash before sale, and the

amounts realized from certificates sold at tax sales, and from certificates sold and assigned after tax sale, and from certificates redeemed while held and owned by the county. The court charged the county with the gross sum of $1,995.46, the amount realized out of the settlements for certificates declared illegal by the court. The amount actually realized on sales of lands which had been tax-deeded to the county is charged against the county as due the town. It appears that the county board compromised and remitted to various persons amounts due for taxes which had been returned delinquent. Such action was disregarded by the court, and the full amount of the taxes involved in such compromises was charged to the county. No part of the uncollected personal property tax is charged against the county. The amounts of expense incurred and paid by the county for certificates marked "Void" by the county records, and on land tax-deeded to the county, including fees for the collection, and for publication of tax-sale notice, and for notice of expiration of time for redemption and certificate fees, are ascertained and specified. It also appears that the county paid the sum of $104.35 as costs in an action by the Chicago, St. Paul, Minneapolis & Omaha Railway Company against the county, wherein tax certificates which had been issued for delinquent taxes were declared void. The court excluded all school-tax items, as not properly embraced within the transactions arising out of the delinquent tax return.

As a result of the accounting made by the court, it appeared that defendant had money in its possession, collected by it as delinquent taxes in excess of the amount due thereon, in the sum of $5,802.73, with interest, for which judgment was awarded the town, together with costs and disbursements. From this judgment, defendant appeals. Facts material to this controversy not stated above will be given in the opinion.

L. H. Mead, for the appellant.

K. K. Kennan, for the respondent.

SIEBECKER, J. 1. It is insisted by the county that any and all claims of the town of *Spooner* embraced in this action were settled by the county board, as evidenced by the resolution of December 28, 1898. This resolution declares "that the county treasurer be and he is hereby instructed to balance all accounts as between the several towns and the county up to and including Dec. 31st, 1898." The record gives no information as to this transaction, other than is disclosed by the context of the resolution, and we are not informed upon what grounds the county board acted in performing the extraordinary public function by which it assumed to discharge and free the county from all legal demands which were then held by towns against it. It is not shown by the evidence that the towns, or any one of them, had presented claims for the consideration of the board, nor does it appear what claims and demands were in fact embraced and covered by this action of the board, nor does it appear that the board knew or attempted to ascertain the state of the accounts between it and the towns. The action and proceeding of the board are unsupported by any basis in fact warranting this summary liquidation and settlement of all reciprocal demands. We know of no authority vesting county boards with power to discharge claims of towns for money collected as delinquent taxes in this *ex parte* manner. Whatever sums the county collects on such taxes, in excess of what is due it under the statutes, shall be returned to the town treasurer for the use of the town. The right of the towns to any such money cannot be wiped out by the simple declaration of the county board that all such accounts be balanced on the books. To give the board jurisdiction in this matter, it is necessary that a claim, in appropriate form, be presented in behalf of the town, and that the town be afforded an opportunity of prosecuting its demand and of taking an appeal in case of an adverse decision by the county board.

It is argued that the case of *Outagamie Co. v. Greenville,*

77 Wis. 165, 45 N. W. 1090, is an authority recognizing the validity of this proceeding. The subject of controversy in that case pertained to the allowance of accounts for services and expense of commissioners appointed to review the county equalization of assessments. Under the law, the county board was authorized to audit and pay these accounts, and, when so allowed and paid by the county, in the absence of fraud or collusion, the action of the county board was binding on the town liable for such charges. It is clear that the county board was by law made the auditing body as to these claims, which made its decision binding on the town liable therefor. No such authority is vested in county boards as regards liability to towns for money collected on delinquent taxes. Counsel place stress on the language used in the opinion in that case, to the effect that "the town is represented in the county board by its supervisor, who has, presumably, every reasonable opportunity to protect and defend its rights in the matter of allowing the accounts of the commissioners," and that "the town is chargeable with notice of the proceeding, and, had it desired to do so, might have contested the accounts." Such a rule could not apply under the facts and circumstances of the instant case, since the proceeding wholly fails to show that any specific claim of any town was under consideration, to which the resolution could apply. But were the declaration of the court applicable to the situation before us, we would be compelled to decline to follow it. We cannot perceive upon what principle it can be held that the town supervisor, while acting in his official capacity as a member of the county board, is the representative of his town to protect and defend its rights as to any claims it may have against the county. If the county board had occasion to act on any such demand, the supervisor, if present, acted in his capacity as member of the county board, vested with authority to transact whatever business arises within its powers as the county authorities; and while so acting he cannot be deemed

to be acting for, or standing in the place of, the town, in a capacity adverse to the county. If his presence at such deliberation of the board were to be given this effect, towns would be subjected to an unusual practice whereby their rights might readily be lost, and they be deprived of the usual means of enforcing their demands against the county. *Miller v. Crawford Co.* 106 Wis. 210, 82 N. W. 175; *Northern T. Co. v. Snyder,* 113 Wis. 516, 89 N. W. 460. We are constrained to disapprove the rule stated in the opinion in that case.

2. A number of exceptions are urged upon the grounds that the court has made charges against the county of different items in these transactions without any warrant in the law. The charges so complained of may be grouped as money collected on (1) taxes on land tax-deeded to it, and on tax certificates it holds on such lands; (2) for the face value of certificates on taxes declared delinquent, which the county board remitted in part, and for which it authorized settlements in full; (3) for interest and charges on delinquent taxes collected; and (4) for interest and charges on collections made in excess of the sums due the county for unpaid county taxes, to be returned to the town treasurer for the use of the town. The statement of the accounts as made and allowed by the court upon the transactions embraced in this action is not sufficiently detailed and specific to enable us to restate the account under the rules which we find must control in an adjustment of the reciprocal claims of the town and the county. No attempt will therefore be made to modify and state the account, but the action will be remanded for a restatement of the account under the rules herein declared to be applicable. To do this, the court may be required to take further evidence in the case.

3. Secs. 1112, 1113, Stats. 1898, provide what taxes shall be returned by town, city, and village treasurers as delinquent and doubly assessed, and direct how such returns are

to be made to the county treasurer. Sec. 1114 provides that when such return is made, duly verified by the affidavit of the town treasurer, the "statement and affidavit shall be filed with the county treasurer; and he shall thereupon be credited by the county treasurer with the amount of taxes so returned as unpaid and doubly assessed, except the five per cent. collector's fees." It further provides that "all taxes so returned as delinquent shall belong to the county and be collected with the interest and charges thereon for its own use; . . . but if such delinquent taxes, exclusive of the five per cent. collection fees, exceed the sum then due the county for unpaid county taxes, such excess when collected (with interest and charges thereon) shall be returned to the town, city or village treasurer for the use of the town, city or village." It is apparent from the terms of this section that the county is to make collections of such delinquent taxes, and, when a sufficient amount, exclusive of the five per cent. collection fee, has been collected to equal the amount "due the county for unpaid county taxes," its claim thereon is satisfied and discharged. The difficulties that have incumbered these transactions between towns and counties have arisen upon the question of what constitutes the amount "due the county for unpaid county taxes," within the terms of this section. Is it a sum which, when collected, equals the amount of the tax levied as county tax, with interest allowed thereon, or is it a sum which, when collected, equals the county tax, with interest and charges on the taxes so collected, or is it a sum which, when collected, equals the county tax, with interest allowed thereon, and all the charges incurred by the county in performing the duty of collecting these delinquent taxes? It is well established that the county, in performing the duties thus imposed, acts as collecting agent for the towns. We find no good grounds, within the terms and provisions of the statute, that impose the disbursements, incident to the collection of these taxes as fixed charges, upon the county. Nor does it ap-

pear by necessary implication that the expense thus incurred in performing this governmental duty, primarily resting upon the town, city, or village, should be borne in part by the taxpayers of other towns, cities, and villages of the county. By reasonable intendment, the legislature must be presumed to have provided a method of collecting taxes under which each of such political divisions of the county should bear the burdens incident to the collection of taxes assessed upon the property within its boundaries. We are therefore led to the conclusion that the amount "due the county for unpaid county taxes" upon such delinquent lists is the sum which equals in amount the county tax, with interest allowed thereon by statute, and all the charges fixed by law, and those necessarily incurred in performing this public duty. In ascertaining the state of the accounts between the county and the respective towns as to the collection upon such delinquent lists, it follows that "whenever, in the course of collecting the whole delinquent tax for any given year, the county reaches a point where it has collected an amount" on the delinquent list equal to the county tax returned unpaid, with interest allowed thereon, and all the disbursements incurred by the county by way of fixed statutory charges and necessary expenses allowed by law, then, and "from that time forward, all collections made from delinquent taxes on such list, together with interest and charges thereon, belong to the towns." The items of charges so incurred by the county, and for which the county should be reimbursed out of the amount collected, include the fixed statutory charges and expenses allowed by law, necessarily incurred by it for illegal assessments included in the delinquent return. The item of five per cent. collection fees on amounts actually collected by the county, whether for its own use or for that of the towns, belongs to the county, and is expressly excluded by the statute from the accounting between them. *Milwaukee Co. v. Hackett,* 21 Wis. 613.

4. Another question presented pertains to charges against

the county on lands sold for taxes and bid in by the county. It was held in *Iron River v. Bayfield Co.* 106 Wis. 587, 82 N. W. 559, that upon such a purchase by the county it is not chargeable while it so holds the certificates. The legal result of the taking of a tax deed on such certificates by the county was specifically held as not necessarily involved in the decision, and left undetermined. Upon the facts before us, the lower court found that the defendant county had taken tax deeds to a portion of the lands purchased by it at tax sales, and had since sold and conveyed a portion of such tax-deeded lands; and it was held that the taking of such deeds in no way changed the county's liability for the unpaid delinquent taxes, and that nothing became due thereon until the county sold such lands, when it became liable for taxes to the amount it had realized thereon. We think this holding erroneous. While the purchase of lands at a tax sale is enjoined upon the county by statute in cases where no bids are received to the amount of the tax, with interest and charges, the law does not make it obligatory upon the county to take a tax deed and thus become the owner. The taking of a deed to such lands purchased by the county is left to the option of the county board, to be exercised whenever it deems it for the best interest of the county to accomplish the general purpose of collecting, as part of the public revenue, what is due. It is not necessary in this case to consider what the legal effect would be if the county, within the fifteen-year limitation under sec. 1182, takes no deeds upon certificates it holds, and we therefore do not pass upon the question. There is nothing in the statute showing that the county, under such deeds, takes a more restricted or qualified title than individuals would take, nor are there any limitations on its power to deal with the lands as it may see fit. Under similar statutes in other states the deed is held to vest all the interest and title in fee, and gives the county full power of disposition. *Conn. Mut. L. Ins. Co. v. Wood,* 115 Mich. 444, 74 N. W. 656; *Dyke v.*

Whyte, 17 Colo. 296, 29 Pac. 128; 2 Cooley, Taxation, 977, 978. The county may therefore dispose of the lands, as sole proprietor, at a price in excess of, or for less than, the redemption value of the tax certificate when the deed was executed. Under such circumstances, it seems within the legislative purpose that the county should be liable to the town as all other purchasers under these circumstances, namely, for the redemption value of the certificate when the land was deeded to the county, and for the redemption value of any outstanding tax certificate on such lands, as well as all subsequent taxes remaining unpaid which were levied while the county owned the land.

5. The court found that some of the taxes returned as delinquent were assailed by legal proceedings as invalid, and that the amounts levied were compromised by order of the court. In all such instances we find the court correctly charged the county with the amount actually collected under such compromise. It appears that the county board, upon application of divers persons, under sec. 1155, made refunds on delinquent taxes. This the court properly credited to the county. In other instances the county board "compromised" or "canceled" unpaid delinquent taxes, or ordered that outstanding certificates be transferred at less than their face value. The court held that such action by the county board was without authority of law, and not within secs. 1155, 1184, Stats. 1898, and charged the county with the face value of the tax, interest, and charges up to the date of such compromise, cancellation, or transfer. This ruling was correct, and within the holding in the case of *Crandon v. Forest Co.* 91 Wis. 239, 64 N. W. 847. There is nothing in the record indicating that these compromises were made as authorized by sec. 1210*g*, Stats. 1898, which empowers the county clerk, county treasurer, and district attorney to compromise taxes returned as delinquent if they shall have good cause to believe such taxes illegal and find a portion thereof is equitably due the county.

6. Exception is taken to the holding of the court in respect to a number of specified items upon the ground either that they were improperly omitted as credits to the county, or improperly included as charges against the county. The county claims credit for $22.70, the cost of books and stationery furnished the town. The court refused this credit, and this ruling is supported by evidence tending to show payment. The county claimed credit for $908.88 as a payment made to the town, which was refused, evidently upon the ground that the proof failed to sustain the claim. We find the evidence sustains the court's conclusion. Another claim is that the court improperly reduced the total amount of the levies of county tax for 1890 from $3,059.32 to $2,177.79—a difference of $871.53. This difference appears to arise from an overpayment of taxes by the town of *Spooner* which was refunded to the town. The court deducted the amount from the delinquent return; thus omitting it as a charge against the county on such return, which therefore required that no credit should be given on the delinquent list for the refund. Another item was of $104.55, being the costs paid by the county in an action brought by the Chicago, St. Paul, Minneapolis & Omaha Railway Company to declare void assessments on lands included in the delinquent return by the plaintiff town. The town made the assessment and levy against these lands, and returned them as valid and delinquent. Under such circumstances, it was the duty of the county to seek to enforce collection, and defend the action wherein the railroad company sought to be relieved from the tax. Any judgment of costs ordered against the county in such action is a necessary expense to be paid by it, and for which it should be reimbursed out of the money collected on the delinquent return of the town.

All other errors argued and not separately noted are deemed to be covered and ruled by what has been stated and considered. Upon the question of the county's liability for interest on any excess collected over what is due it on such

delinquent taxes, the liability attaching to demands or mutual accounts seems applicable. These transactions between counties and towns are analogous to an open account between persons. The county is therefore not liable for interest from the date of each collection made for the town, but, whenever the town demands payment of any sum due it which has actually been collected by the county, and such sum is not paid, then liability for interest on the sum due must follow.

By the Court.—The judgment is reversed, and the cause remanded with directions for further proceedings as indicated in this opinion and according to law.

FLEMING and another, Appellants, vs. ELLISON, Administrator, Respondent.

January 11—January 31, 1905.

Action for specific performance: Recovery of damages: Changing cause of action: Death of party: Revival of action: Laches: Discretion.

1. If, pending an action for specific performance of a contract to convey land, defendant has, by a sale to another person, put it out of his power to convey to plaintiff, the latter may, in such equitable action, recover his damages for the breach of contract.
2. Where in such a case the defendant died after conveying the land to a third person, and plaintiffs, by a supplemental complaint, elected to take damages in lieu of specific performance, the cause of action was not changed from equity to law, and the action might be revived against defendant's administrator.
3. Upon an application to revive and continue an action against representatives of a deceased defendant the question of laches is not, as in the case of a limitation, a mere matter of time, but is principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relation of the property or parties.
4. An action for specific performance of a contract to convey land was commenced in March, 1900, and noticed for trial, by plaint-

iffs, at the May term, 1901. Defendant obtained a continuance against plaintiffs' objection, on the ground of his poor health. Neither party attempted to bring the case to trial at the October term, 1901, or the May term, 1902, plaintiffs believing that defendant was still in poor health, which was the fact. He died in October, 1902. He had conveyed the land in question to a third person in August, 1900. An administrator was appointed in January, 1903. In January, 1904, on a supplemental complaint, electing to take damages instead of specific performance, plaintiffs applied to have the action revived against the administrator. No claim for such damages had been presented against defendant's estate, and when the motion was heard the time for such presentation had expired. No loss had resulted to the administrator by reason of the delay after the defendant's death. *Held*, that there had been no laches warranting the denial of the motion to revive, and that such denial was an abuse of discretion. WINSLOW, J., dissents.

APPEAL from an order of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Reversed.*

This action was brought March 22, 1900, against one Thomas Carmichael, to compel specific performance of a contract dated August 5, 1899, by which defendant agreed to convey certain lands in Chippewa county to plaintiffs for $4,125. The complaint, after alleging the terms of the contract, avers that plaintiffs tendered to defendant the contract price and demanded a deed, which defendant refused to execute. Defendant answered, admitting the ownership of the lands, making of the contract, and refusal to execute a deed; alleging as a reason that plaintiff *Donnellan* misrepresented the value of the lands.

It further appears that plaintiffs moved the court for an order amending the title of the action, and to revive against the administrator, and filed a supplemental complaint alleging that on August 6, 1900, defendant conveyed the lands to one Smith, by warranty deed, for $5,625, which was duly recorded; that defendant thereby placed it beyond his power and the power of his personal representatives to fulfill his contract; that by such sale defendant had sold the lands for

$1,500 more than the amount of the contract price with the plaintiff; that on October 13, 1902, defendant died; that on January 6, 1903, *A. F. Ellison* was appointed administrator; that at the time of sale to Smith the lands were worth $6,525, and, because defendant had placed it out of his power and the power of his heirs and representatives to fulfill his contract, plaintiffs elected to recover the profits of the sale, amounting to $1,500, and demanded judgment for $1,500, interest and costs, together with such other and further relief as to the court might seem just and equitable.

Plaintiffs noticed the case for the May term, 1901. Defendant on May 9, 1901, applied for continuance, which was denied. The application was renewed on May 18, 1901, and granted, against the objection of plaintiffs. The grounds of the application for continuance were that defendant was in poor health and unable to attend trial. At the time of continuance Carmichael was not confined to his bed, but was up and around—being, however, in poor health—and continued to fail up to the time of his death. For a few months prior to his death he was unable to attend to business.

Neither party attempted to bring the case to trial at the October, 1901, and May, 1902, terms of court; the failure of the plaintiffs to notice the case being because of the former continuance on account of ill health of Carmichael, and belief that he had not in the meantime recovered. It further appears that the plaintiffs for a period of about four months expended much time and money in endeavoring to sell the lands; that conversations were had between plaintiffs' attorney and the administrator concerning motion to revive, and no desire was expressed on the part of the administrator to have the matter speedily heard; that the administrator has lost nothing by the delay since the death of Carmichael; and that the time for plaintiffs to file their claim against the estate of Carmichael had elapsed when motion to revive was heard.

From the order overruling the motion to revive, this appeal is taken.

For the appellants there was a brief by *Wickham & Farr,* and oral argument by *James Wickham.*

W. F. Bailey, for the respondent.

KERWIN, J. The question involved is whether the court erred in denying plaintiffs' motion to revive and continue the action against the administrator. It does not appear upon what grounds the court below denied the motion, but it is contended by respondent, first, that the supplemental complaint on motion to revive changed the action from one in equity to one at law, which could not be done and the action revived against the administrator; and, second, that the plaintiffs were guilty of such laches as to justify the court in denying the application to revive.

1. It is not denied that at the time of the death of Carmichael the plaintiffs had a good cause of action in equity, which survived; but it is contended that because the plaintiffs, in their supplemental complaint, elected to take damages in lieu of specific performance after Carmichael had put it out of his power to perform, this amounted to a change of the cause of action from equity to law, which could not be done and the action continued against the administrator of Carmichael. We think this proposition is untenable. It is well settled that "if a person in good faith brings an action in equity, alleging facts sufficient to constitute a good cause of action within some recognized principle of equity jurisprudence, but fails to establish some fact essential thereto, yet does establish a state of facts entitling him to some relief by way of damages or otherwise, the court will not dismiss the bill and thereby render further litigation necessary, but will retain it and render such judgment as will do complete justice between the parties." *Franey v. Warner,* 96 Wis. 222, 71 N. W. 81; *Gates v. Paul,* 117 Wis. 190, 94 N. W.

55; *Combs v. Scott,* 76 Wis. 662, 45 N. W. 532. This doctrine applies to equitable actions for specific performance of contracts for the sale of real estate, where pending the action the party who agreed to convey has put it out of his power to do so by a sale of the real estate. *Hall v. Delaplaine,* 5 Wis. 206; *Combs v. Scott,* 76 Wis. 662, 45 N. W. 532. The motion to revive was to revive the action then pending, which was equitable in its nature, but which nevertheless gave plaintiffs the right to recover damages because defendant had put it out of his power to convey. No relief being sought by the supplemental complaint, other than what the plaintiffs would have been entitled to against Carmichael after he had put it out of his power to convey, the cause of action was not changed from equity to law, but plaintiffs were entitled to damages in the equitable action. *Hall v. Delaplaine,* 5 Wis. 206; *Combs v. Scott,* 76 Wis. 662, 45 N. W. 532; *Franey v. Warner,* 96 Wis. 222, 71 N. W. 81; *Gates v. Paul,* 117 Wis. 170, 190, 94 N. W. 55. In *Hall v. Delaplaine, supra,* it appears that the land was conveyed to a third party without notice, and it was held that a court of equity would retain the action and award damages; and in *Combs v. Scott, supra,* it appears that the purchaser had notice, but the court held specific performance ought not to be enforced on account of the gross laches of the plaintiff, and further held that, because the statute of limitations had run against the plaintiff in the action at law, the court of equity should hold the case and award plaintiff his damages. It will be seen that the facts in the case at bar bring the plaintiffs within the doctrine of the above cases, and entitle them to recover damages in the action pending at the time of Carmichael's death, growing out of the breach of his contract with plaintiffs. It therefore follows that the revival should be against the administrator, and not against the heirs. Secs. 3501, 3907, Stats. 1898; *Cotter v. Plumer,* 72 Wis. 476, 40 N. W. 379.

2. The next question to be considered is whether the plaint-

iffs were guilty of such laches as to warrant the court in denying the motion to revive. Sec. 2800, Stats. 1898, provides:

"An action does not abate by the occurrence of any event, if the cause of action survives or continues."

Sec. 2803, Stats. 1898, provides:

"In case of the death or other disability of a party, if the cause of action survives or continues, the court, on motion, at any time within one year thereafter or afterwards, on a supplemental complaint, may allow or compel the action to be continued by or against his representatives or successor in interest."

This section is permissive, and not mandatory, but contains no limitation upon the time in which a revival may be had upon supplemental complaint. Sec. 2811*a*, Stats. 1898, being ch. 119, Laws of 1897, provides, in effect, that the circuit courts and superior courts may dismiss actions which shall not be brought to trial within five years from the commencement thereof. This statute was passed after the decisions of this court in *Cavanaugh v. Scott,* 84 Wis. 93, 54 N. W. 328, where the motion to revive was made eighteen years after the commencement of the action, and *Carberry v. German Ins. Co.* 86 Wis. 323, 56 N. W. 920, where motion to revive was made about twelve years after the commencement of the action, and indicates the legislative policy that actions should not be permitted to slumber indefinitely, but that a reasonable time should be allowed within which to prosecute them, and provides a limitation. In the case at bar the delay was slight. The action was commenced in March, 1900; Carmichael died October 13, 1902; and the respondent has not been prejudiced by delay since the death of Carmichael. The general policy of the law favors the revival of actions and trial on the merits, when the interests of justice will be promoted and no unnecessary prejudicial laches is shown. *Jones v. Jones,* 74 N. Y. Supp. 297; *Landis v. Olds,* 9 Minn. 90; *Plumer v. McDonald L. Co.* 74 Wis. 137, 42 N. W. 250; *Jones v. Graham,*

80 Wis. 6, 49 N. W. 122; *Bloor v. Smith,* 112 Wis. 340, 87 N. W. 870. It appears that if the action be not revived the plaintiffs' rights will be lost, because the time within which to present their claim against the estate of deceased has elapsed. The case therefore comes within the doctrine of *Hall v. Delaplaine,* 5 Wis. 206, and *Combs v. Scott,* 76 Wis. 662, 45 N. W. 532, unless the plaintiffs have lost their rights to revive by laches. A brief reference to the facts will show that the plaintiffs were not guilty of laches. The plaintiffs seasonably moved the case after the commencement thereof, and the defendant Carmichael obtained a continuance over the May, 1901, term, against the objections of plaintiffs, on account of defendant's illness. The defendant was up and around at the time of the continuance, and perhaps as well able to attend trial and give his evidence as he was at any time thereafter up to the time of his death, and much better than for a period of about three months immediately preceding his death. The plaintiffs believed that any attempt on their part to bring the case to trial after the continuance of May, 1901, would be resisted by defendant on account of his illness, and it appears from the facts disclosed that they were justified in such belief. In *Cavanaugh v. Scott,* 84 Wis. 93, 54 N. W. 328, relied upon by respondent, the delay for a period of eighteen years, and which greatly prejudiced the defendant, was "unexplained and inexcused;" and this court there said: "An application to revive and continue an action must be decided upon all the facts and circumstances of the case, whether occurring before or after the death of the party, with a view to the ends of substantial justice." 84 Wis. 99, 54 N. W. 329. In the case of *McCann v. Welch,* 106 Wis. 142, 81 N. W. 996, in speaking on the subject of laches, at page 149 (81 N. W. 998), this court says:

"Courts of equity, however, are not dependent on statutes of limitation for their right to deny hearing to those who unduly have slumbered on their rights. This power has been

exercised by those courts from the earliest times, with no fixed rule, however, as to the lapse of time necessary or sufficient to exclude a suitor from their forum. Very great lapse of time, if reasonably excused and without apparent hurt to the defendant, has been ignored; and, again, very slight delay, accompanied by circumstances of negligence, apparent acquiescence, or change of defendant's position, has sufficed."

All the cases proceed upon the theory that laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relation of the property or parties. *Galliher v. Cadwell,* 145 U. S. 368, 12 Sup. Ct. 873. The elements of abandonment and acquiescence are entirely wanting in the case at bar. Neither has there been any change in the respondent's condition, occasioned by the delay. It is true, he lost the evidence of Carmichael, if that were material, in aid of his defense. The delay during which Carmichael died was induced, or at least contributed to, by the defendant. This loss, if it be a loss, is not chargeable to the plaintiffs.

We are therefore of the opinion that the court below abused its discretion in denying the motion to revive, and that the order should be reversed.

By the Court.—Order reversed, and the cause remanded to the court below for further proceedings according to law.

WINSLOW, J. (*dissenting*). I take no issue with the proposition that if a plaintiff, who has in good faith brought an action in equity, fails for some reason to establish his equitable right, but shows himself entitled to legal relief, the court will ordinarily retain the action and grant the proper legal relief. I do not consider this principle, however, to be the controlling proposition in this case. It is undisputed here that the plaintiffs knew of Carmichael's conveyance of the land in question at about the time it took place—i. e., in

August, 1900; that Carmichael died in October, 1902; and that the plaintiffs, knowing the facts rendering specific performance impossible, and hence that money damages would be their sole relief, allowed the time fixed by the statute for filing claims against the deceased to pass. They then came into court and asked a court of equity to allow the action to be revived, not to obtain specific performance of the contract, but for the purpose only of obtaining a money judgment, which they say they elect now to take. Now, while this may not be strictly the substitution of a cause of action at law for one in equity (although it certainly comes very near it), it must be conceded that this motion presented to the trial court a question of discretion. That court evidently concluded that in view of the fact that the plaintiffs, with knowledge of all the facts, had allowed the full period for the presentation of claims against the estate to pass, it would not allow the action in equity to be revived simply for the sake of recovering a claim for money which should properly have been presented to the probate court. There was here a question of discretion, and the order should not be reversed except for abuse of discretion, and it seems to me this has not been shown.

J. V. LECLAIR COMPANY, Respondent, vs. ROGERS-RUGER COMPANY, Appellant.

January 11—January 31, 1905.

Money had and received: Collection of debt due former partners: Evidence: Competency of witnesses.

1. An action for money had and received can be maintained only when the defendant has received money which, in equity and good conscience, he ought to pay to the plaintiff.
2. In an action between former partners or their successors in interest to recover a share of a debt due the firm which had been

excepted from the partnership settlement, it being alleged that plaintiff's share had afterwards been collected by defendant through certain logging transactions with the debtor, the evidence is *held* not to show that defendant had collected or received any part of such debt.

3. Evidence in such case, offered by defendant, as to money and supplies furnished to the debtor in the logging transactions mentioned, and tending to show that said debtor was still indebted to defendant on account of such transactions, was admissible.

4. It appearing from the debtor's own testimony that he did not know even approximately how much timber had been taken from certain lands under his contract with defendant or what the profits therefrom were, he was not competent to testify that it had always been his idea, and he still thought, that there was enough timber taken from such land to pay certain prior claims and also the debt in which plaintiff was interested.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

This is an action at law, commenced March 31, 1903, to recover $1,327.64, with interest from September 20, 1899, alleged to be due from the defendant to the plaintiff on account of certain partnership logging transactions in which J. V. LeClair and Rogers & Ruger, as partners, were engaged, under written contracts between them, during 1897 and 1898. The plaintiff and defendant are both Wisconsin corporations, and the plaintiff claims by assignment from J. V. LeClair, and the defendant is sought to be charged as the successor of the firm of Rogers & Ruger. The complaint alleges, among other things, in effect, that all such logging transactions were closed between them, and settled to the mutual satisfaction of both parties, except a claim exceeding $3,000 against O. J. Dodge & Co., which on September 20, 1899, the defendant, as the successor of Rogers & Ruger, on its own responsibility, settled with Dodge & Co., and appropriated to itself LeClair's interest in said claim, of the value of $1,327.64, and has collected and holds the same, and refuses to pay it over to the plaintiff, for which it demands judgment.

The defendant answered by way of admissions, denials, and counter allegations, among other things, that such claim against Dodge & Co. is the only unsettled transaction mentioned; that the amount of that indebtedness has never been fully determined; that it is about $3,000, and that LeClair is entitled to thirty-five per cent. of the same when collected; and specifically denies that September 20, 1899, or at any time, the defendant settled with Dodge or Dodge & Co. the said indebtedness, or any portion of it; and denies that it appropriated to itself any interest LeClair had in said claim in the sum mentioned, or any other sum; and denies that it has collected or has in its possession or ever had in its possession any part of such indebtedness due from Dodge or Dodge & Co.; and defendant alleges that such indebtedness from Dodge & Co. is still due, owing, and unpaid.

It was admitted on the trial that LeClair's interest in two thirds of the claim was thirty-five per cent., and in one third of the claim fifty-five per cent. At the close of the trial the court directed a verdict in favor of the plaintiff for $1,298.75, which is made up of the per cents mentioned on $3,000, with $48.75 interest thereon from the commencement of this action. From the judgment entered upon such verdict accordingly, the defendant appeals.

The partnership agreements between Rogers & Ruger and J. V. LeClair, mentioned in the pleadings, were dated, respectively, November 17, 1897, and February 1, 1898, one of which is marked "Exhibit C," and the other "Exhibit B," and are to the effect that they were to purchase the white and Norway pine timber on the 120 acres in section 12, described in Exhibit C, for $2,750, and on the 160 acres in section 1, described in Exhibit B, for $5,600, upon the following terms and conditions: Rogers & Ruger are to furnish the purchase price, and to advance the money, without interest, necessary to the logging, sawing, and carrying of the timber *until the sale of the same is effected;* both parties are to work for the

best interests of all in the cutting and disposing of the timber, and neither party to make any charge for services—LeClair to have the supervision of all matters incident to the cutting and selling of the timber, and Rogers & Ruger to keep all books and accounts in connection with the same; the net profits or losses on the purchase of timber and sale of lumber are to be shared between the parties as follows: LeClair fifty-five per cent., and Rogers & Ruger forty-five per cent., on the timber taken from the lands described in Exhibit C, and LeClair thirty-five per cent., and Rogers & Ruger sixty-five per cent., on the timber taken from the lands described in Exhibit B.

It is undisputed that all the lands described in those two contracts belonged to Dodge & Co. It appears, and is undisputed, that September 20, 1899, the defendant herein entered into a written agreement with O. J. Dodge & Co. wherein it is recited that prior thereto said parties made and entered into certain agreements for the cutting, hauling, and manufacturing into lumber certain timber from the lands mentioned in said Exhibits C and B, to be manufactured at the mill of Dodge & Co., and, in the course of the carrying out of said agreement, Dodge & Co. had become indebted to this defendant in the sum of "approximately" $3,000, the actual amount of which is not yet determined, for the reason that the work contemplated in said agreements is not yet completed, of which said sum $1,500 is hereby agreed to be for machinery furnished to Dodge & Co. by this defendant; and further recited, in effect, that A. P. Lovejoy held a mortgage of $900 given by Dodge & Co. on the 160 acres in section 1, described in Exhibit B, and also on eighty acres of other lands in section 30, not described in either of those contracts; and also recited that Dodge & Co. are the owners of all of said lands, and also 160 acres of other lands described in section 6, not mentioned in either of said contracts; and further recited that the parties thereto were desirous during the then

coming season of logging said lands and manufacturing the logs therefrom into lumber, and, if the operations cannot be completed during the present season, then they should be during the then ensuing season; that the defendant herein has a second mortgage on the lands covered by the Lovejoy mortgage, for $210, and interest; that Dodge & Co. desire to secure the financial aid of this defendant in logging said lands, and in sawing the logs taken therefrom into lumber, and disposing of said lumber; therefore it was therein mutually agreed, in effect, that Dodge & Co. were to cut and remove from said lands, and the whole thereof, all merchantable pine timber thereon, and haul the same to the mill and saw the same into lumber, and haul the same and load the same on cars, as therein required; that the defendant herein agrees to furnish the necessary funds to carry on the whole of said operations, and to have particular charge of receiving orders for lumber, to keep all books except time and mill books, to invoice shipments, and attend generally to all office work connected with said operations, to make collections, to assume and have general financial control and direction of the sale of the lumber, the collection of the amounts due therefor, and the giving or refusing of credits to purchasers; that Dodge & Co. were to have charge of the logging operations and the sawmill work, piling, handling, loading, and shipping of lumber, and should keep time and mill books of account; that the title to the lumber was immediately to pass to this defendant upon the piling of the lumber at the mill, and that, in the further handling of the same, Dodge & Co. were to act only as the agents of this defendant; and that it was therein further agreed that the moneys collected from the sales of lumber should be disposed of as follows: first, to pay the Lovejoy mortgage of $900 and interest; second, to repay to this defendant all moneys advanced under the contract, with interest at six per cent.; third, the net balance remaining after paying such two items should be disposed of as follows: There

shall be due to Dodge & Co. $3 per 1,000 feet for all logs cut and removed from any of said lands, and there shall be due to the defendant herein the said $3,000 indebtedness, but, if this net balance is insufficient to pay the last two mentioned items, they shall be paid *pro rata.* If these last two items shall be paid in full, and there shall remain any balance, the same shall be divided equally between Dodge & Co. and this defendant.

The cause was submitted for the appellant on the brief of *H. V. Gard,* and for the respondent on that of *Geo. P. Knowles.*

CASSODAY, C. J. It is undisputed that the partnership transactions mentioned in the pleadings were all settled before the commencement of this action, except an indebtedness of approximately $3,000 against Dodge & Co., in which LeClair's interest was thirty-five per cent. on two thirds thereof, and fifty-five per cent. on one third thereof, and that the balance of such indebtedness belonged to the firm of Rogers & Ruger. It is also undisputed that both parties to this action are corporations organized under the laws of this state, and that prior to the commencement of this action such interest of LeClair passed to the plaintiff herein by assignment, and that such interest of Rogers & Ruger therein became the property of this defendant. For convenience, we will hereafter refer to LeClair as the one party, and the Rogers Company as the other party.

At the close of the testimony, each party moved for the direction of a verdict in its favor. The court denied the defendant's motion and granted the plaintiff's motion, and thereupon directed a verdict in favor of the plaintiff and against the defendant for $1,298.75, made up of the following items: thirty-five per cent. of $2,000, amounting to $700; fifty-five per cent. of $1,000, amounting to $550; and $48.75, being the interest on those sums from the commencement of

the action. Of course, the thirty-five per cent. mentioned had reference to the thirty-five per cent. of "the net profits or losses" mentioned in the contract of February 1, 1898 (Exhibit B), and the fifty-five per cent. mentioned had reference to the fifty-five per cent. of "the net profits or losses" mentioned in the contract of November 17, 1897 (Exhibit C).

1. This is an action at law for money had and received. Such an action "can be maintained only when the defendant has received money which, in equity and good conscience, he ought to pay to the plaintiff." *Glendale I. Asso. v. Harvey L. Co.* 114 Wis. 408, 412, 413, 90 N. W. 170, and cases there cited. In such an action "it is not sufficient to show that the defendant has, by fraud or wrong, caused the plaintiff to pay money to others or to sustain loss or damage." *National T. Co. v. Gleason,* 77 N. Y. 400, 403. As recently stated by our late Brother BARDEEN: "The purpose of such an action is not to recover damages, but to make the party disgorge, and the recovery must necessarily be limited by the party's enrichment from the alleged transaction." *Limited I. Asso. v. Glendale I. Asso.* 99 Wis. 54, 59, 74 N. W. 633; *Johnston v. Charles Abresch Co.* 109 Wis. 182, 184, 85 N. W. 348. Such being the law applicable, it is obvious that, in order to sustain such direction of the verdict, it must appear from the undisputed evidence that before the commencement of this action the defendant had received $3,000 as net profits from the lumber referred to in the two contracts (Exhibits B and C) in which LeClair had such fractional interest, as mentioned. The question recurs whether such direction of the court is sustained by the undisputed evidence.

The theory of the complaint is that such indebtedness of Dodge & Co. was ascertained September 20, 1899, the date of the contract between the defendant and Dodge & Co. (Exhibit A), and that the defendant then, on its own responsibility, settled such indebtedness with Dodge & Co., and collected and appropriated the same, including LeClair's interest

therein, to itself, and still had possession thereof, and refused to pay it over to the plaintiff. Accordingly the complaint demands interest from the date of that contract, September 20, 1899. But the evidence fails to sustain such theory. Mr. LeClair himself testified, among other things, to the effect that he did not know of that contract until the following year (1900), when he claims to have had an accounting and settlement with the Rogers Company of all property belonging to them, as partners, except such indebtedness of about $3,100 due to them from Dodge & Co., of which he was to have the fractional shares mentioned; that the Rogers Company had never paid him his proportionate share of that indebtedness, but that everything else had been paid and settled; that March 12, 1902, the defendant paid him $1,190.49, and that he gave his receipt therefor "in full of all claims . . . except as to O. J. Dodge & Co. shortage." That was two years and a half after the making of contract Exhibit A. Such indebtedness, therefore, was still unpaid at the time of giving that receipt. Apparently it was sought to have payment of such indebtedness inferred from the extensive logging deals between the defendant and Dodge & Co. It appears from the testimony of the witness Dodge, and is undisputed, that Dodge & Co. not only got in the logs and timber from the 280 acres of land described in the two contracts (B and C) in which LeClair was interested, but also got in the logs and timber from 240 acres of other lands, in which LeClair was not interested, described in Exhibit A, and also got in logs and timber, under parol contracts, from still other lands, not mentioned in any of those written contracts, from which there was manufactured between three and four million feet of lumber, and that all such logs and timber were mixed together and sawed and piled at the same mill, and that no separate account of the logs got in under any of such contracts was ever kept. The witness Dodge also further testified to the effect that he thought there was timber enough taken from

the lands described in Exhibit A to pay the several amounts thereby secured, but that he could not state the amount of profit made under that contract; that the advances to his firm had been paid; that he did not know whether any portion of the moneys realized from Exhibit A was ever applied toward the $3,000 secured by that contract; that he never got any receipt or any paper, aside from the satisfaction of the Lovejoy mortgage, showing what amounts were paid under that contract; that the defendant had rendered a number of statements of moneys received and disbursed under that and subsequent contracts, but never any separate statement as to that contract, and he thought the lumber under that contract was so badly mixed with lumber under other contracts as to render it impossible to make such separate statement; that he knew it was all piled together and sold, and no separate account of it kept; that he understood that the lumber was all to go in together and to be sold in one bulk, and so his company did not furnish the defendant any way to keep the lumber separate; that he could not say how much of the lumber was under Exhibit A, as they logged there without scaling the logs, nor how much under other contracts; that no final settlement was ever made; that he could not probably come within a couple of million feet of it, and he would not undertake to say how much profits there were; and that he never settled or asked for a settlement under Exhibit A.

The burden of proof was on the plaintiff. It failed to prove that such admitted indebtedness of Dodge & Co., or any part thereof, had been collected or received by the defendant before the commencement of this action. On the contrary, some of its evidence tended to prove that it had not been so collected or received. Seemingly, counsel for the plaintiff was of that opinion, for, just before asking for the direction of a verdict in favor of the plaintiff, he stated to the court "that the *balance of the account* in favor of *Rogers-Ruger Company* and Mr. LeClair against Mr. Dodge or O. J. Dodge

& Co. was just $3,000." The defendant's witness Ruger testified that there had been no settlement of that account. Seemingly the ruling of the trial court was based on the theory that the plaintiff could, in this form of action, recover LeClair's share of such indebtedness, whether the same, or any part of it, had been collected or received by the defendant or not. This was contrary to the authorities cited. It follows that the court improperly directed a verdict in favor of the plaintiff.

2. Numerous errors are assigned for the admission and exclusion of testimony. Upon the principles of law stated, it was, of course, proper for the plaintiff to prove, as far as it could do so by competent evidence, whether the indebtedness of Dodge & Co. in question, or any part thereof, had been paid to or received by the defendant; and so it was equally proper for the defendant to prove, so far as it could do so by competent evidence, that such indebtedness had not been so paid to or received by the defendant. The plaintiff's witness Dodge was asked on cross-examination whether he was indebted to the defendant as a result of the logging transactions under the contract Exhibit A, and, upon the principles already stated, the same was improperly excluded. So the court improperly excluded testimony tending to prove that Dodge & Co. were still indebted to the defendant "on account of that whole transaction that was kept together there," as he had stated. So it was error for the court to exclude testimony offered on the part of the defendant tending to prove how much money and supplies had been furnished to Dodge & Co. by the defendant under contract Exhibit A as originally drawn, and also as subsequently modified. So it was error for the court to exclude testimony offered by the defendant tending to prove whether at any time since the making of the contract Exhibit A there had been anything owing to Dodge & Co. from the defendant, over and above the moneys and supplies it had furnished to that company. The witness

Dodge, on the part of the plaintiff, was allowed to state that it had always been his idea, and he still thought, that there was enough timber taken from the lands described in Exhibit A to pay the moneys advanced for logging, and the Lovejoy mortgage of $900, and this claim of $3,000, in which LeClair had such interest. Such testimony was so admitted without any showing that the witness had the requisite knowledge to testify on that subject, and his testimony above stated shows that he was incompetent to give such testimony. On the same theory the court, at the close of the testimony, refused to strike out so much of the testimony of the witness Dodge as tended to show that there were profits made from the timber described in Exhibit A, distinct from the timber subsequently taken in. We are constrained to hold that there was a mistrial.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

JACOBS, Appellant, vs. HERSHEY LUMBER COMPANY, Respondent.

January 11—January 31, 1905.

Logs and logging: Overflow of lands: Liability.

In an action for damage to hay on plaintiff's meadow lands along a river, alleged to have resulted from defendant's piling logs on the ice in such quantities that they broke through and formed a dam, causing the river to overflow the meadows, the evidence showed that defendant had contracted to buy the logs, which were to be delivered in the river afloat in time for the spring drive, and had contracted with other persons to drive the logs, but that at no time was defendant in control of the logs or responsible for the manner in which they were handled. *Held*, that a verdict for defendant was properly directed.

APPEAL from a judgment of the circuit court for Burnett county: A. J. VINJE, Circuit Judge. *Affirmed.*

The plaintiff owns two forty-acre tracts of meadow land in Burnett county, bordering on the Clam river, a logging stream tributary to the St. Croix river. Defendant is a Minnesota corporation manufacturing lumber at Stillwater, Minnesota. The plaintiff alleges that in the winter of 1900–01 the defendant cut and piled logs on the ice in Clam river opposite his meadow in such quantities that they broke through the ice and formed a dam, which remained in the river until about June 1, 1901, causing the river to overflow his meadow and ruining the hay thereon, and also leaving a large number of logs stranded thereon, to his damage in the sum of $300. The defendant denies that it placed or caused to be placed any logs on the river, and denies that the plaintiff suffered any damage. The action was tried before a jury, and at the close of the evidence a verdict for the defendant was directed, and judgment rendered thereon, from which the plaintiff appeals.

A. L. Bugbee, for the appellant.

For the respondent there was a brief by *Mead & Hoar,* and oral argument by *L. H. Mead.*

WINSLOW, J. A number of errors in the rulings upon evidence are alleged, but as they cannot in any way affect the question which we deem decisive of the case they will not be considered.

While the evidence of the plaintiff tended to show that large quantities of logs bearing the defendant's marks were piled on the ice in the Clam river during the winter of 1900 and 1901, causing a jam, as a result of which the plaintiff's meadow was overflowed and damaged, the evidence also showed, without material dispute, that the defendant was at no time in control of the logs or responsible for the manner in which they were handled. The defendant was not doing

any logging upon Clam river. Olson & Sund were logging upon the river, and the defendant agreed with them to buy all the logs which they might cut or purchase during the winter in question, and that the logs so purchased were to be marked with the defendant's mark and delivered in Clam river afloat in time for the spring drive. The defendant also contracted with the firm of Stinson & Gore to drive the logs to Stillwater or to Nevers's dam. One Chase was employed jointly by defendant and Olson & Sund to scale the logs, and was also employed by the defendant to see that the logs were driven clean and report all logs left in the river after the drive, but he had no control over the operations of Olson & Sund or of Stinson & Gore.

The mere statement of these facts shows that the defendant was not responsible for any negligence of Sund & Olson in landing the logs on the ice, or of Stinson & Gore in driving them, and justifies the direction of a verdict for the defendant.

By the Court.—Judgment affirmed.

TOURVILLE, Appellant, vs. S. D. SEAVEY COMPANY, Respondent.

January 11—January 31, 1905.

(1) Certiorari: *Petition: Waiver of defects.* (2) *Municipal courts: Adjournments: Docket entries: Jurisdiction.*

1. The petition for a writ of *certiorari* should specify the jurisdictional defects relied upon, and defects not so pointed out will not be considered.
2. The municipal court of Douglas county was required by law (sec. 6, ch. 112, Laws of 1893) to be held in a room in the city hall of Superior, to be provided by said city, but discretion was given to the judge to try cases in some room in the court house of the county when he should deem it more convenient. *Held,*

that failure to state in the docket the place to which an adjournment was taken was not fatal to the jurisdiction, the necessary inference in such a case being that the place where the summons was made returnable was the place where the cause would be called for trial after the adjournment.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

In response to a writ of *certiorari* to review a judgment of the municipal court of Douglas county, Wisconsin, the proceedings in regard thereto were returned to the circuit court for such county. The petition assigned as the sole jurisdictional defect that upon the return day of the summons there was no appearance by the defendant and the cause was adjourned for one week, no entry being made in the docket as to the place to which it was adjourned; that on the return day, though the defendant did not appear and the court had lost jurisdiction of the cause, plaintiff was permitted to make proof of his claim and take judgment for $86.71, damages and costs. The result of the hearing in the circuit court was a judgment of affirmation, from which defendant appeals.

The cause was submitted for the appellant on the brief of *D. E. Roberts,* and for the respondent on that of *H. V. Gard.*

MARSHALL, J. As indicated in the statement, the only jurisdictional defect mentioned in the petition is the omission to enter upon the court docket the place to which the trial of the cause was adjourned. We agree with respondent's counsel that proper practice requires the applicant in such cases to state in his petition specifically the jurisdictional defects relied upon, the court issuing the writ to regard all others, if any there be, waived, and to affirm or reverse the judgment or other final decision involved according to the effect thereon thereof. There is no definite declaration to that effect in our decided cases, neither is the practice regulated by statute. It is wholly of judicial origin and came

to us with the common-law writ which was preserved in our judicial system. In like situations elsewhere courts in reviewing proceedings as to jurisdictional defects when challenged by such a writ, universally regard those not specified as relied upon in the petition as waived.

The writ of *certiorari* is not one of strict right. Whether it shall or shall not issue in any given case rests in the sound discretion of the court. *Knapp v. Heller,* 32 Wis. 467; *State ex rel. Schintgen v. La Crosse,* 101 Wis. 208, 77 N. W. 167. Hence the propriety of requiring every jurisdictional defect, upon which the petitioner intends to rely, to be plainly pointed out and brought to the attention of the court in order that its discretion may be intelligently exercised in passing upon the application for the writ, and the propriety also of examining the return only as it responds to the points of challenge. The return on such points, when it fully presents the record, is conclusive and furnishes the sole basis for answering the question of whether the judgment should be reversed or affirmed. The statement in 4 Ency. of Pl. & Pr. 293, to which respondent's counsel refers, voices the rule in that regard correctly, thus:

"The petition or affidavit upon which the writ issues serves the purpose of an assignment of errors, and no irregularities will be considered except such as are pointed out therein, although they are apparent of record."

The numerous cases cited in the note fully bear out the text, among them being the following: *Everett v. C. R. & M. R. Co.* 28 Iowa, 417; *Hollins v. Johnson,* 3 Head (Tenn.) 346; *Noel v. Scoby,* 2 Heisk. (Tenn.) 20; *Lyles v. Cox,* 10 Lea (Tenn.) 738; *Adams v. Fitzgerald,* 14 Ga. 36; *New Jersey R. & T. Co. v. Suydam,* 17 N. J. Law, 69; *Curran v. Atkinson,* 1 Ashm. (Pa.) 51.

The question of whether failure to state the place to which the cause was adjourned was fatal to the jurisdiction is ruled in favor of respondent by *State ex rel. LeClair v. Wright,* 80

Wis. 648, 50 N. W. 894, where upon due consideration it was held that the doctrine of *Brown v. Kellogg,* 17 Wis. 475, and similar cases respecting necessity for strict compliance with the statute, sec. 3574, Stats. 1898, as to entering upon the docket of a justice of the peace the place to which he adjourns a case for further proceedings, should not be extended to any court required to hold its sessions at a particular place provided therefor by public authority. The reason for the strict rules as to justices is that, without such an entry as the statute requires in case of an adjournment, the parties interested would have no way of knowing where the case would again be taken up, except by the verbal declaration of the justice, and the statute plainly does not require dependence to rest on that. Such reason, of course, is entirely wanting where the sessions of the court are required by law to be held at a particular place. By a familiar principle, the reason for the rule failing, the rule itself has no application. See *Snyder v. Malone, post,* p. p. 59, 102 N. W. 354.

True, there is a difference between the statute under consideration in *State ex rel. LeClair v. Wright,* and the one in question. In the former the place for trials was required to be provided by the municipality and no discretion was given to the judge to try causes elsewhere, while in the latter the situation is the same, except in that authority is given the judge to try cases in some room in the court house of Douglas county whenever he deems it convenient for himself, the witnesses, or parties. Under such law the place where the summons is made returnable, by necessary inference, is the one where the cause will be called for trial in case of an adjournment, in the absence of some entry upon the docket made on the day of such adjournment naming some other proper place therefor in the court house of Douglas county, and there is no better reason for applying the strict rule as to justices' courts in such circumstances than in case of a statute not giving the discretionary authority referred to. Such strict rule

has a legitimate basis, but it is liable to lead to much hardship where failure to comply with it really is not prejudicial to the one liable to invoke it. Hence it is considered that it should be confined quite closely within the boundaries of the reason therefor.

By the Court.—Judgment is affirmed.

MCKIVERGAN, Appellant, vs. ALEXANDER & EDGAR LUMBER COMPANY, Respondent.

January 12—January 31, 1905.

Railroads: Injury to servant: Negligence of fellow-servant: Construction of statute.

Sec. 1816, Stats. 1898 (making railroad companies liable for all damages sustained by their employees, under certain circumstances, through the negligence of other employees), applies only to railroad companies engaged in a general railroad business for the carriage of passengers and freight, and does not apply to a private railroad used as an incident to conducting a private business.

APPEAL from a judgment of the superior court of Douglas county: C. SMITH, Judge. *Affirmed.*

This action was brought to recover damages which plaintiff claims to have suffered by the negligence of defendant. The defendant is a corporation under the laws of Wisconsin, "organized for the purpose of carrying on a general logging, lumbering, and manufacturing business, buying and selling real estate and merchandise." In connection with defendant's business it operates a private railroad. The operation of its railroad business extends from Iron River, Bayfield county, to a place one mile west of Brule—a distance of about twelve miles over the tracks of the Northern Pacific Railway Company, and thence over their private side track for about four

miles, with spurs projecting into adjacent timber lands. In conducting its railroad it used two geared locomotives in hauling logs to the sidetracks, and two regular locomotives in hauling timber to its mill at Iron River. It also used Russel logging and other cars for this purpose, part of which were leased from the Northern Pacific Railway. The Northern Pacific track used by defendant is a part of its main line, and while running over its track defendant operates under orders of the Northern Pacific Company. It used this track daily for the passage both ways of two or three trains of from twelve to sixteen cars.

At the time of the accident complained of, plaintiff was in defendant's employ and engaged as brakeman in the operation of defendant's logging trains. The injury occurred while plaintiff was in the discharge of his duty as such brakeman, and while in the act of making a coupling between one of defendant's logging cars and the engine. It is alleged that while plaintiff was exercising ordinary care in performing his duty, in attempting to place and adjust the link to make the coupling, the engineer carelessly and negligently caused the cars to move towards plaintiff and against the logging car, causing the injury to his fingers and hands.

The case was tried and submitted to a jury, who found for the plaintiff and awarded him damages. Thereafter the defendant moved for judgment in its favor notwithstanding the verdict, which motion the court granted, and awarded judgment accordingly. This is an appeal from such judgment.

For the appellant there was a brief by *W. P. Crawford,* attorney, and *Crownhart & Foley,* of counsel, and oral argument by *C. H. Crownhart.* To the point that the defendant is a railroad company within the meaning of sec. 1816, Stats. 1898, they cited sec. 1861, Stats. 1898; *Roe v. Winston Bros.* 86 Minn. 77, 90 N. W. 122; *Schus v. Powers-Simpson Co.* 85 Minn. 447, 89 N. W. 68; *Pearson v. C., M. & St. P. R. Co.* 47 Minn. 9; *Johnson v. St. P. & D. R. Co.* 43 Minn. 222;

Blomquist v. G. N. R. Co. 65 Minn. 69; *Kline v. Minnesota I. Co.* (Minn.) 100 N. W. 681.

For the respondent there was a brief by *Ross & Dwyer,* and oral argument by *W. D. Dwyer.*

SIEBECKER, J. The court awarded judgment dismissing the complaint, notwithstanding the verdict, for the reason that no actionable negligence had been shown against defendant. The ruling was based upon the ground that the liabilities established by the provisions of sec. 1816, Stats. 1898, did not attach to defendant. This section provides:

"Every railroad company operating any railroad which is in whole or in part within this state shall be liable for all damages sustained within the same by any of its employees without contributory negligence on his part . . . (2) while any such employee is so engaged in operating, running, riding upon, or switching passenger, freight or other trains, engines or cars, and while engaged in the performance of his duty as such employee, and which such injury shall have been caused by the carelessness or negligence of any other employee, officer or agent of such company in the discharge of or for failure to discharge his duties as such."

It is contended by plaintiff that in construing this statute the phrase "railroad company," as used in this section, is to be applied as the phrase "railroad corporation" is used in sec. 1861, Stats. 1898, which is as follows:

"The phrase 'railroad corporation,' as used in these statutes, may be taken to embrace any company, association, corporation or person managing, maintaining, operating or in possession of a railroad, whether as owner, contractor, lessee, mortgagee, trustee, assignee or receiver."

Adopting this interpretation leads us to the inquiry, Upon whom did the legislature intend to impose the liabilities prescribed by the terms of sec. 1816, Stats. 1898? Were its terms only to apply to railroad corporations doing a public service, commonly known as "commercial railroads," or was

it intended to impose these liabilities on every person, company, or corporation operating trains, engines, or cars, regardless of whether such business was in the nature of a public service as common carrier, or devoted exclusively to a private enterprise, including no public service? The question is not so clear and plain as to be free from all difficulties. If the statute be held to apply to the character of the employment, then no valid reason is suggested why it should not be held to cover all classes of public and private railroads, regardless of the nature of their business. The contents of this particular section might, in its literal sense, permit of such an application. This, however, would put it out of harmony with the other provisions of ch. 87, Stats. 1898, covering legislation "on railroads" in this state. The best way to ascertain the legislative intent, under such circumstances, is to consider all the legislative provisions on the subject of which the provision is a part; keeping in view the occasion and necessity of the law and the object sought to be accomplished.

An examination of the provisions of this chapter discloses numerous provisions pointing to the fact that the legislation therein contained referred exclusively to railroad corporations doing the usual business of a public or commercial railroad. Among some of its provisions are those prescribing equality of rates for the transportation of persons or of property for a like service; the obligation to furnish cars for the transportation of property within a reasonable time after notice; the obligation to follow the regulations prescribed for the shipment of grain, carrying of live stock, the stopping of trains, the maintenance of guards and fences, and other requirements for the protection and safety of the public. An important and distinguishing characteristic of railroads included within the purview of this chapter is the grant to every corporation organized under it of the power of exercising the right of eminent domain in its *quasi*-public character. In the case of *Chicago & N. W. R. Co. v. O., A. & B. W. R. Co.*

107 Wis. 192, 83 N. W. 294, it was held, in effect, that these provisions make it clear, and must remove any doubt, that in the legislative intent a railroad corporation, within the provisions of this chapter, is one engaged in a general railroad business "for the carriage of passengers and freight—a common carrier in its fullest sense—and to it [are] given the fullest provisions for condemnation of lands, as compensation for the great public duties imposed upon and assumed by it." The difference between such a railroad and one used as an incident to conducting a private business is readily perceived and understood without elaboration. The objects and uses of the one are far removed from those of the other, though the instruments of operation, such as tracks, cars, and engines, may be common to both.

Since the provisions of all these sections of this chapter, aside from sec. 1816, plainly and unmistakably include commercial railroads only, is there any conceivable ground for holding that this section includes private as well as commercial railroads or common carriers? We have discovered nothing which would warrant the court in enlarging the meaning of the terms of this section beyond the plain meaning of the same terms in the other provisions of this chapter. Every argument for so extending its terms applies with equal force to their use throughout other provisions on this subject. We must conclude that sec. 1816 is intended to embrace within its provisions only such railroad companies as are contemplated by ch. 87, Stats. 1898, namely, one engaged in a general railroad business for the carriage of passengers and freight; that is, a common carrier in the fullest sense. From this it necessarily follows that defendant does not come within the terms of the statute. *Beeson v. Busenbark,* 44 Kan. 669, 25 Pac. 48; *Manhattan Trust Co. v. S. C. C. R. Co.* 68 Fed. 82; *Ellington v. Beaver Dam L. Co.* 93 Ga. 53, 19 S. E. 21.

The case of *Roe v. Winston,* 86 Minn. 77, 90 N. W. 122, is cited to our attention. In this case it appeared that plaint-

iff was injured in this state while in defendant's employ as brakeman on a private train used in connection with defendant's business of general railroad construction work, and the court held he was entitled to recover under the provisions of sec. 1816. His right to recover was predicated on the ground that the provisions of this section applied to a private railroad business. The decision follows the construction adopted by the court in construing a similar Minnesota statute, holding that it was applicable to the business of a private as well as a public service railroad. We are unable to avoid the conclusion that this construction is opposed to the manifest intent of the legislature, as embodied in this section and the other legislation on this subject.

By the Court.—The judgment is affirmed.

BUELL and others, Respondents, vs. ARNOLD, Appellant.

January 12—January 31, 1905.

Counties: Judgments: Execution: Lien on lands: "Person."

[1. Whether land owned by a county can be levied upon and sold on execution, not determined. The remedy for collection of a judgment by compelling the levy of a tax should be pursued, at least until it proves ineffectual.]

2. The docketing of a judgment against a county does not create a lien upon its lands under sec. 2902, Stats. 1898,—not even upon lands to which it has taken title under tax deeds in proceedings to collect the taxes thereon. The word "person" in said section does not include a county, notwithstanding the provision of subd. 2, sec. 4972, Stats. 1898, that such word "shall extend and be applied to bodies corporate unless plainly inapplicable." *Rains v. Oshkosh*, 14 Wis. 372, distinguished.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

The plaintiffs *Buell,* one Leland, and *Rossman* brought suit against the defendant for strict foreclosure of a land contract, dated October 1, 1902, for the purchase by defendant from plaintiffs of 3,492.40 acres of land in Douglas county. Pending the action *William M. Prindle,* as trustee in bankruptcy, was substituted as plaintiff in place of Leland. The purchase price of the land was $8,207.14, of which $850 was paid on the contract, the defendant agreeing to pay the balance part in cash when a good title was furnished, and part by assuming and paying a mortgage of $3,500. The contract also provides that plaintiffs should convey the land by warranty deed, but, if the title should not prove good and could not be made so, the purchase money paid to be returned to the defendant.

The defendant answered, admitting the making of the contract and payment of $850 thereon; that he was ready and willing to comply with the contract, but that plaintiffs had failed to furnish title to the lands; that the plaintiffs' title was subject to the lien of certain judgments amounting to $6,993.40; that defendant demanded satisfaction and discharge of said lien, which plaintiffs failed and neglected to do. Defendant also pleaded a counterclaim setting up the contract and the plaintiffs' failure to furnish good title, and demanded judgment for specific performance, damages, and general relief.

It further appears from the undisputed facts that prior to the execution of said contract Douglas county had obtained title, through tax deeds, to certain of the lands, and while holding title judgments were rendered against the county and in favor of certain creditors amounting to $6,993.40, which judgments were docketed and remained unpaid and unsatisfied at the time of the commencement of this action.

The court below entered judgment providing that the rights and interests of the defendant be barred and foreclosed unless he pay the amount found due on the contract, with inter-

est and costs, within six months from the date of the judgment, from which judgment this appeal is taken.

For the appellant there was a brief by *Arnold & Arnold,* attorneys, and *James Wickham,* of counsel, and oral argument by *Mr. Wickham.* They contended that the judgments were liens on the lands under sec. 2902, Stats. 1898. The county is a body corporate (sec. 650, Stats. 1898) and a "person" within the meaning of sec. 2902. Subd. 2, sec. 4972, Stats. 1898; *Segnitz v. Garden City B. & T. Co.* 107 Wis. 171–178; *Lyman Co. v. State,* 9 S. Dak. 413, 69 N. W. 601; *State ex rel. Sackett v. Thomas,* 25 Mont. 226; *Lancaster Co. v. Trimble,* 34 Neb. 752, 52 N. W. 711; *People ex rel. Adams v. Oakland,* 92 Cal. 611; *Rains v. Oshkosh,* 14 Wis. 372. Where a municipal corporation owns real estate not used for governmental purposes, such real estate is subject to the lien of a judgment against such corporation, and may be sold on execution to satisfy such judgment. *Darlington v. New York,* 31 N. Y. 164–192; *Wheeler v. Miller,* 16 Cal. 124; *Holladay v. Frisbie,* 15 Cal. 630; *LeRoy v. Dunkerly,* 54 Cal. 452; *Murphree v. Mobile,* 104 Ala. 532; *Murphree v. Mobile,* 108 Ala. 663; *State ex rel. Courter v. Buckles,* 8 Ind. App. 282, 35 N. E. 846; *Hart v. New Orleans,* 12 Fed. 292; *Brinkerhoff v. Board of Education,* 37 How. Pr. 499; *New Orleans v. House Mut. Ins. Co.* 23 La. Ann. 61; *Sherman v. Williams,* 84 Tex. 421; *Laredo v. Nalle,* 65 Tex. 362; *Laredo v. Benavides,* 25 S. W. 482–485; *State v. Tiedemann,* 69 Mo. 306; *Brown v. Gates,* 15 W. Va. 131; 2 Dillon, Mun. Corp. (4th ed.) § 567.

R. I. Tipton, for the respondents, argued, among other things, that lands sold to counties for unpaid taxes are public property, charged with a public trust, and held and used for governmental purposes. Secs. 650, 651, Stats. 1898. Judgments against the county are therefore not liens on such lands. *Iron River v. Bayfield Co.* 106 Wis. 587; *Crandon v. Forest Co.* 91 Wis. 239. But regardless of these special provisions

of our statutes, it is a general rule of law, based on grounds of public policy, that judgments against a public or municipal corporation are not liens on their lands and that executions cannot issue against their property. *Chicago v. Hasley,* 25 Ill. 595; *King v. McDrew,* 31 Ill. 418; *Olney v. Harvey,* 50 Ill. 453; *Board v. Edwards,* 76 Ill. 544; *Bloomington v. Brokaw,* 77 Ill. 194; *Morrison v. Hinkson,* 87 Ill. 587; *Flora v. Naney,* 136 Ill. 45; *Schaffer v. Cadwallader,* 36 Pa. St. 126; *Foster v. Fowler,* 60 Pa. St. 27; *Gilman v. Contra Costa Co.* 8 Cal. 52, 68 Am. Dec. 290; *Emeric v. Gilman,* 10 Cal. 404, 70 Am. Dec. 742; *Indianapolis & B. R. Co. v. Indianapolis,* 12 Ind. 620; *Davenport v. Peoria M. & F. Ins. Co.* 17 Iowa, 276; *Meriwether v. Garrett,* 102 U. S. 472, 26 L. ed. 97; *New Orleans v. Holmes,* 13 La. Ann. 502. In many jurisdictions it is held that judgments against a municipal corporation create no lien on its real estate because no execution can issue, and that judgments are never liens where the right to issue execution does not exist. *Schaffer v. Cadwallader,* 36 Pa. St. 126; *Conard v. Atlantic Ins. Co.* 1 Pet. 433; *Leedom v. P. R. Co.* 5 W. & S. 266; *Williams v. Controllers,* 18 Pa. St. 275; *Davenport v. Peoria M. & F. Ins. Co.* 17 Iowa, 276; *Lambs v. Shays,* 14 Iowa, 567; *Cole v. Green,* 21 Ill. 104; *Indianapolis & B. R. Co. v. Indianapolis,* 12 Ind. 620; *State v. Tiedemann,* 69 Mo. 306; *Brickley v. Boston,* 20 Fed. 207. The remedy of judgment creditors of municipal corporations is by *mandamus* to compel their officers to levy a tax. *State ex rel. Carpenter v. Beloit,* 20 Wis. 79; *State ex rel. Sherman v. Common Council,* 20 Wis. 87; *State ex rel. Hasbrouck v. Milwaukee,* 25 Wis. 122; *State ex rel. Burns v. Supervisors,* 34 Wis. 169; *State ex rel. Pfister v. Manitowoc,* 52 Wis. 423; *Comm. ex rel. Armstrong v. Comm'rs,* 37 Pa. St. 277; *Klein v. New Orleans,* 99 U. S. 149; *Morrison v. Hinkson,* 87 Ill. 587. Such remedy should be held to be exclusive until it is shown to be ineffective. The statutory method of enforcing judgments against municipali-

ties must be strictly pursued. *Emeric v. Gilman,* 10 Cal. 404, 70 Am. Dec. 742; *Randolph Co. v. Ralls,* 18 Ill. 29; *Wilson v. Huntington Co.* 7 Watts & S. 197.

KERWIN, J. The only question involved is whether the judgments rendered and docketed against Douglas county became liens upon the lands in suit. There is no dispute upon the facts. If the judgments in question were liens upon any of the lands described in the contract, the decision of the court below is erroneous; if not, it is right. The general doctrine is that the property of municipal corporations cannot be seized or sold upon execution. 1 Dillon, Mun. Corp. § 446; 1 Black, Judgments (2d ed.) 407; 1 Freeman, Executions, § 126; *President, etc. of I. & B. R. Co. v. Indianapolis,* 12 Ind. 620; *Davenport v. Peoria M. & F. Ins. Co.* 17 Iowa, 276; *Gilman v. Contra Costa Co.* 8 Cal. 52; *Flora v. Naney,* 136 Ill. 45, 26 N. E. 645; *Schaffer v. Cadwallader,* 36 Pa. St. 126; *Williams v. Controllers,* 18 Pa. St. 275; *People ex rel. Davis v. Superior Court,* 55 Ill. App. 376; *State v. Tiedemann,* 69 Mo. 306. In some states it is held that private property of municipal corporations, held in their own right for profit or as a source of revenue, and not charged with any public trust, may be seized and sold on execution. 2 Dillon, Mun. Corp. § 446; *Meriwether v. Garrett,* 102 U. S. 472; *Brown v. Gates,* 15 W. Va. 131; *Murphree v. Mobile,* 108 Ala. 663, 18 South. 740. The doctrine is very fully discussed in *Brown v. Gates, supra,* and many cases cited. Judge Dillon, in 2 Dillon, Mun. Corp. § 446, says:

"In some of the states it is held that the private property of municipal corporations—that is, such as they own for profit, and charged with no public trusts or uses—may be sold on execution against them. In other states, either by statute or on general principles, it is declared that judgments against municipal corporations cannot be enforced by ordinary writs of execution, and that the remedy of the creditor is by *man-*

damus to compel payment, or the levy of a tax for that purpose. Questions of this kind are influenced much by local legislation."

Counties are parts of the state government, exercising delegated political powers for public purposes, and can take and hold lands for public use only. They cannot hold property for profit, or take title to it for the purpose of revenue, the same as an individual or private corporation. *Mayor v. Root,* 8 Md. 95; *Brown v. Gates,* 15 W. Va. 157; *Chicago v. Hasley,* 25 Ill. 595. The doctrine is stated in *Chicago v. Hasley, supra,* at page 595, as follows:

"The nature, objects, and liabilities of political, municipal, or public corporations we think stand on different grounds. These corporations signify a community, and are clothed with very extensive civil authority and political power. All municipal corporations are both public and political bodies. They are the embodiment of so much political power as may be adjudged necessary by the legislature granting the charter for the proper government of the people within the limits of the city or town incorporated, and for the due and efficient administration of their local affairs. For these purposes the authorities can raise revenue by taxation, make public improvements and defray the expenses thereof by taxation, exercise certain judicial powers, and generally act within their limited spheres as any other political body, restrained only by the charters creating them; beyond them they cannot go. This power of taxation is plenary, and furnishes, ordinarily, the only means such corporations possess by which to pay their debts. They cannot be said to possess property liable to execution, in the sense an individual owns property so subject, for they have the control of the corporate property only for corporate purposes, and to be used and disposed of to promote such purposes, and such only."

It is claimed, however, by appellant that the lands taken by the county on tax deeds are not held for any public purpose except to sell and use the proceeds to pay the debts of the county, and therefore should be subject to sale upon exe-

cution. But the lands are acquired by the county while exercising its delegated political powers in the collection of taxes for public purposes. The acquisition of the land puts the county in a position to collect the tax for the nonpayment of which the lands were returned. In considering this subject in *Iron River v. Bayfield Co.* 106 Wis., at page 592, 82 N. W. 561, this court says:

"In construing the various provisions of title XIII, Stats. 1898 ('Taxation'), it must be continually borne in mind that the whole general purpose is the collection of revenue for the several subdivisions of the government—state, county, municipal, and school district. The formal acquisition of any lien or title in accordance with those provisions, whether by any municipal corporation or county or by any public officer, is primarily to continue or enforce the original right of the government against property, to the end that it may secure therefrom ultimately the money which such property or its owner ought to contribute towards governmental expenses, for with nothing but money can those expenses be paid. Such money, when received, by whichever of the collecting agencies, is then apportioned among the various governmental subdivisions according to their original rights. In the enforcement of such liens it may be unavoidable—it is always undesirable—that actual title to property should be taken. The purpose of the law, nevertheless, is collection of money and not acquisition of property; and clear language is necessary to justify inference of a legislative purpose that any step is to transpose the public body or officer from the position of a collecting agent into a proprietary, so as to substitute for the duty to account merely for the money ultimately received a duty to pay the ostensible price."

The statutes provide a remedy for the collection of judgments against counties by the levy of taxes, and ample power exists to compel the proper officer to make such levy. It is evident that it was the intention of the legislature that such remedy should be pursued, at least until it proves ineffectual.

It is not necessary to decide here whether land owned by a

county can be levied upon and sold on execution, and we therefore refrain from expressing any opinion upon that question.

The appellant contends that the docketing of the judgments against Douglas county created a lien on its lands under sec. 2902, Stats. 1898. This position is untenable. Sec. 661, Stats. 1898, relating to enforcement of judgments against counties, provides that no execution shall be issued on any such judgment "except upon leave of the court upon motion after the lapse of sixty days after the time when the town treasurers should by law have made returns of taxes." This provision restricting executions upon judgments against counties, together with the special statutory provisions for the collection of judgments by the levy of tax, and the general policy of the law upon the subject, seem plainly to indicate that the word "person," as used in sec. 2902, Stats. 1898, concerning docketing of judgments, does not apply to counties.

Counsel for appellant contends that subd. 2, sec. 4972, Stats. 1898, providing that the word "person" shall extend and be applicable to bodies corporate, unless plainly inapplicable, brings counties within the provisions of sec. 2902, which provides "every such judgment, when so docketed, shall, for a period expiring ten years from the date of the rendition thereof, be a lien on the real property in the county where the same is docketed, . . . of every person," and cites, among other cases, *Rains v. Oshkosh,* 14 Wis. 372. An examination of these cases will show that they are not applicable to the question now before us. In *Rains v. Oshkosh, supra,* the municipality went into possession of land under a lease, agreeing to pay the rent, and having authority under its charter to make the contract; and it was held in a suit for the unlawful holding over of the demised premises that the suit could be maintained, and that the word "person" in the unlawful detainer statute applies to municipal corporations hold-

ing demised premises after the termination of the lease contrary to the covenants thereof. Of course, in this case the word "person" was plainly applicable, and the same may be said of the use of the word "person" in other cases cited in appellant's brief. We think, however, that the word "person," as used in sec. 2902, Stats. 1898, is plainly inapplicable to counties. In *Chicago v. Hasley,* 25 Ill. 595, the court held that the word "person" in a statute similar to ours does not embrace any incorporated city, town, or municipal or political corporations under a statute authorizing the issuing of executions; and this court holds in *Burnham v. Fond du Lac,* 15 Wis. 193, and *Buffham v. Racine,* 26 Wis. 449, that the word "person," as used in the garnishee statute, does not apply to municipal corporations.

In the light of the statutes of this state and cases cited we think it clear that the judgments docketed against Douglas county create no lien upon the lands in question, and that the judgment of the court below should therefore be affirmed.

By the Court.—The judgment of the court below is affirmed.

AEBI, Respondent, vs. BANK OF EVANSVILLE, Appellant.

January 12—January 31, 1905.

Bank checks: Indorsement and deposit in another bank: Presentment: Delay: Loss of check: Discharge of indorser: Renewal of liability by new contract.

1. Where a check upon another bank is indorsed by the payee and deposited in the bank in which he keeps an account, and the latter bank accepts it and credits the amount as cash to the depositor's account, to be checked against as he sees fit, these acts indicate, *prima facie,* the completed transfer of the check, by which the bank accepting it becomes the owner thereof and not a mere agent to collect.

2. In such a case the payee of the check is chargeable only as an indorser, and to charge him as such the check must be presented for payment within a reasonable time.
3. The bank receiving the check in such a case mailed it on the same day (Sept. 21) to the drawee bank, located in a city seventeen miles distant. It gave the matter no further attention until about Oct. 1, when it learned that the check had not reached its destination and was lost. It did not notify the payee until Oct. 19, and presentment of a duplicate was not made until Oct. 26, when payment was refused, the drawer having then no funds in the drawee bank, although at several times after Sept. 21, including Oct. 1–3, he had had a balance there exceeding the amount of the check, and up to Oct. 23 was in apparent credit at the bank to an amount more than sufficient to satisfy the demand. *Held*, that prior to Oct. 19 the payee had been discharged from liability as indorser.
4. The payee having been absolutely discharged, any renewal of his liability must be by new contract; and his co-operation with the indorsee bank in obtaining and indorsing a duplicate check, at the request of such indorsee and to enable it to obtain the money from the drawee, did not amount to a waiver of the previous omissions of the indorsee or to an agreement to assume a new liability.
5. Only when an indorser was informed of all the material facts resulting in his discharge from liability, will a new promise of liability be implied from acts which otherwise might justify such implication.

APPEAL from a judgment of the circuit court for Rock county: B. F. DUNWIDDIE, Circuit Judge. *Affirmed.*

Plaintiff, a farmer residing about five miles from Evansville, kept account in defendant bank. It was accustomed to receive checks payable to his order upon the faith of his indorsement, and credit them to him as cash, and collect them without charge, and in case of dishonor to charge the checks back to him on his account. On September 14, 1901, plaintiff received a check dated August 31, 1901, from one Speich, a cheese dealer at Brodhead, upon the bank at that city, seventeen miles distant from Evansville, with daily mail between these places. This check, on September 21st, he indorsed and deposited with the bank, and was given credit for it as cash.

The defendant on the same day mailed it to the Brodhead Bank for payment and remittance; heard nothing from it, and gave no further attention to it for about ten days, when a card of inquiry was sent, to which no reply was received. After waiting several days longer, defendant's cashier telephoned to the Brodhead Bank, and learned that no such check had been received; and waited still several days, and telephoned again, receiving the same information. It was proposed that the Brodhead cashier ask Speich for a duplicate. Not until October 19th did defendant notify the plaintiff that the check was not paid. Then the assistant cashier asked him to apply to Speich for a duplicate, which he consented to do when opportunity presented. He accordingly saw Speich on the 21st of October, who wrote out a duplicate check, payable to plaintiff, dated same as former, marked "Duplicate," and with notation, "Original not payable," and mailed it to defendant. On the following day the defendant wrote to plaintiff "to call and sign check when in town." On October 25th he called, and, at the request of the defendant, wrote his name on the back of the duplicate check. The check was then sent to the Brodhead Bank, reaching there October 26th, and was refused, Speich having about that time absconded, leaving a bank balance of about $400, which was absorbed by the Brodhead Bank by charging up a note to him.

During the time from September 21st to October 26th Speich persistently had a balance at the Brodhead Bank, except for a day or two when there was a few dollars overdraft, and seems to have been in good credit in that bank, for they discounted his note on one or more occasions. The balance was usually less than the amount of this check, but frequently only by a few dollars. On several days, however, between September 21st and October 19th, the balance exceeded the amount of the check, to wit, on October 1, 3, 9, 10, 14, and 17. During that interval, to wit, on September 28th and October 25th, the defendant twice balanced up plaintiff's

passbook containing the credit for this check, and showing a balance in his favor made up in part thereof; but on the 28th of October wrote plaintiff that the check was dishonored and Speich had run away, saying, "Please call at bank and attend to same." On November 12th defendant charged up in plaintiff's account and on his passbook the amount of said check. On the following day plaintiff presented a check for the exact balance which would be to his credit without charging up said Speich check, and demanded payment thereof, which the bank refused, offering to pay him the balance after deducting the Speich check.

This action was brought to recover such entire balance. The court found the facts substantially as stated, and, as conclusions of law, that the check upon its deposit became the property of the defendant, and that the failure of the bank to present for payment and notify plaintiff had discharged him as indorser. The court seems to have refused to pass on the effect, by way of waiver, of plaintiff's indorsing the duplicate check on October 25th, for the reason that no waiver was pleaded. Judgment was entered for plaintiff for the amount demanded, from which the defendant brings this appeal.

For the appellant there was a brief by *Richmond & Richmond* and *F. J. Lamb,* and oral argument by *T. C. Richmond.*

For the respondent there was a brief by *J. L. Sherron* and *Thomas Luchsinger,* and oral argument by *Mr. Sherron.*

DODGE, J. We have no doubt of the correctness of the court's finding of fact that by the general indorsement of the check in question, its acceptance by the bank, and the credit of the amount as cash to the plaintiff in his general account to be checked against as he saw fit, with nothing to qualify the effect of such acts, the bank became the owner of the check, as distinguished from a mere agent to collect the same on behalf of the plaintiff. All of the acts above recited *prima*

facie indicate the discount and completed transfer of the check. 2 Morse, Banks & B. § 573; *Shawmut Nat. Bank v. Manson,* 168 Mass. 425, 47 N. E. 196; *Taft v. Quinsigamond Nat. Bank,* 172 Mass. 363, 52 N. E. 387; *Burton v. U. S.* 25 Sup. Ct. 243. Only by clear evidence could a contrary significance be accorded them. There is no such evidence sufficient to constitute a clear preponderance such as would be necessary to warrant us in disagreeing with this finding.

Such being the transaction, the right of the defendant to charge back the amount of this check or to collect from the plaintiff is only that resulting from the relation of indorsee and indorser. The rules governing that relation are familiar, and largely now codified in our Negotiable Instrument Law, ch. 356, Laws of 1899. In order to charge indorser upon a check or inland bill of exchange payable on demand, presentment must be made by the holder within a reasonable time after it comes to his possession. Sec. 1684—2. Such reasonable time is not fixed by statute, but by consensus of authority, in absence of special circumstances of excuse, is limited to the next business day, or, if the bank upon which the check is drawn is at another place, the check must be forwarded to the place of payment on the next business day, and presented at latest upon the day following its receipt at the place of payment. *Gifford v. Hardell,* 88 Wis. 538, 60 N. W. 1064; *Lloyd v. Osborne,* 92 Wis. 93, 65 N. W. 859; *Grange v. Reigh,* 93 Wis. 552, 67 N. W. 1130. The check in question never was presented for payment until October 25th or 26th, and clearly, by such delay, the indorser was discharged unless such delay was excused. The only excuse suggested is the loss of the check. If it be conceded that the defendant was guilty of no negligence in adopting the United States mails as a method of transmission, nor in sending the check direct to the bank upon which it was drawn, thus taking chances of acquiring prompt knowledge whether it was honored or dishonored when it reached the payee, nevertheless

it is excused from making presentment and demand only so long as, consistently with reasonable diligence, it was prevented by the loss of the check. Sec. 1678—11, Negotiable Instrument Law. It would seem extremely doubtful whether defendant could claim, in the exercise of due care, to have been so prevented even during the ten days which it waited after mailing the check before making any inquiry about it and before learning of its loss. By ordinary course of mail the check should have reached the Brodhead Bank as early as the 23d, and, unless there was some difficulty, plaintiff should have been notified of its payment or refusal at least as early as the 24th of September. We shall not deem it necessary to decide whether it was not the duty of the defendant to make inquiry immediately upon failure to receive such notification in such ordinary course of mail. Even if that were not so, it did receive notice of the failure of the check to reach its destination some time about the 1st of October. Upon learning that its attempted presentment by mail had failed, and that the check was lost, at least for the purposes of immediate presentment, defendant had the opportunity and owed the duty to at once make substituted presentment and demand by means of a copy or sufficient description of the check, and in case of nonpayment to give notice to the indorser. 1 Parsons, Notes & Bills, 368, 448, 530; 2 id. 260, 261; 2 Edwards, Bills, §§ 672, 697; *Smith v. Rockwell,* 2 Hill, 482; *Hinsdale v. Miles,* 5 Conn. 331; Negotiable Instrument Law, *supra,* sec. 1681—17. Surely reasonable diligence would have enabled presentation long before October 19th. While the effect of the failure to present for payment and to give notice of dishonor within a reasonable time absolutely discharges the indorser without proof of damage or injury to him, it may be pointed out that in this case damage is quite obvious. The defendant having affirmatively learned of the loss of the check somewhere about October 1st, it appears that on the 1st, the morning of the 2d,

and on the 3d of October Speich had a bank balance more than sufficient to meet this check; hence a prompt presentment at any one of those times would in all probability have secured its payment. But, if that were not so, Speich was in active business, and in apparent credit to an amount more than sufficient to satisfy such demand up to about October 23d, and, had plaintiff been promptly notified on or about October 1st of either the loss or the dishonor of the check, he would have had opportunity to make demand, and probably to secure payment from the maker. See *Shipsey v. Bowery Nat. Bank,* 59 N. Y. 485.

From the foregoing no conclusion is possible save that long prior to October 19th, when defendant informed him of the loss of the check, plaintiff had been discharged from liability thereon as indorser. But it is urged that, by co-operating at the request of the defendant in obtaining a duplicate in order that the same might be used in lieu of the original, he waived the previous omissions on the part of the defendant, and renewed his liability. Having been entirely discharged, any renewal of his liability must be by new contract. *Tebbetts v. Dowd,* 23 Wend. 379; *Knapp v. Runals,* 37 Wis. 135. The question therefore arises whether the transaction detailed in the evidence, about which there is no substantial dispute, amounted to a contract on the part of the plaintiff to assume a new liability as indorser on Speich's new check. Doubtless, when a check has been lost or destroyed, so that the payee or his assigns has not received the money thereby ordered paid, the drawer may give a new and independent check, treating the old transaction as canceled, and in that case the rights and liabilities of all parties may be as if the new check were given upon any other consideration. Equally, however, the parties may proceed on the purpose of merely supplying written evidence of the former transaction, to take the place of that lost, simply to facilitate proceedings or perfect records. In that case no new contract is made. All

rights grow out of the original transaction or contract, and are exactly the same as if such transaction were proved orally instead of by the new or duplicate written evidence which the parties have supplied. In the latter case the equitable assignment worked by a check under Wisconsin decisions prior to the new statute would be complete from the original date—just as in the case of a lost deed the making of a duplicate would not change the time of transfer of title nor make any new covenants of warranty. Hence the giving of a new check after loss or destruction of a former one is of itself alone ambiguous, and may evince intent to enter into new relations, or merely supply evidence of those already existing, according to the surrounding circumstances. The dating back of the new check to correspond with the lost one and marking it "Duplicate" tend to indicate the latter purpose, for they are wholly immaterial to the mere purpose of enabling the holder to obtain the money which he failed to get on the first check, and, being unusual, are significant. In *Benton v. Martin,* 31 N. Y. 382, it was held that the extrinsic facts accompanying the giving of a duplicate draft indicated an intent to assume new liabilities. Later, in the same case, other extrinsic facts were shown and held to establish the contrary intent, and the drawer was held discharged by omission to seasonably present the original. 40 N. Y. 345; 52 N. Y. 570. In these later decisions it is strongly suggested that the word "Duplicate" upon the second instrument tended to refute any purpose to make a new contract, and some other evidence of such purpose would be necessary. In *Moody v. Mack,* 43 Mo. 210, the obtaining and inclosing a duplicate was held ineffective to excuse failure to notify an indorser.

In the case at bar there is certainly nothing, except the obtaining and indorsing of the new check, to prove an intent on part of either plaintiff or defendant that the latter should assume any additional responsibility. All the evidence indicates that the duplicate was deemed to be needed by the

bank, rather than by plaintiff, for the first attempt to obtain it was through its correspondent at Brodhead; and when it did request plaintiff to communicate with Speich it apparently conveyed the impression that it was asking of him a favor in its own behalf. He did not understand that he was interested, or that his credit for the amount was subject to be lost, upon any contingency. Speich also evidently had the same idea, for he mailed the duplicate direct to the bank instead of giving it to the plaintiff, as would have been natural had either of them supposed his interest was to be affected or convenienced by the transaction. Of course, plaintiff's indorsement was just as essential to make the paper a duplicate of that which had been lost as to give formal rights upon the new instrument, if such it were. No entry was made on the bank books to indicate any change in plaintiff's liability. We cannot escape the conviction that the new paper was intended by all parties to be what it was so industriously marked, namely, a facsimile and duplicate of the former, identical in essence, operation, and legal effect (*State ex rel. Fenelon v. Graffam,* 74 Wis. 643, 647, 43 N. W. 727); that when the bank obtained it all parties were placed in exactly the same situation in fact and in law as if the original had that day come back to it through return of the lost letter, and therefore that no new promise or waiver of past neglect was made.

Another consideration which obstructs any implication of waiver or new promise by plaintiff is absence of knowledge on his part of the facts upon which his discharge from liability rested. No information was given him as to when the loss of the check was discovered, or whether a due presentment had been made or payment refused. Only when an indorser is informed of all the material facts is a new promise of liability to be implied from acts which otherwise might justify it. *Low v. Howard,* 10 Cush. 159; *Hamilton v. Winona S. & L. Co.* 95 Mich. 436, 54 N. W. 903.

From the foregoing discussion must result the conclusion that plaintiff was fully discharged from any liability to defendant upon the check in question, and was entitled to recover his deposit balance without deduction of the amount of that instrument.

By the Court.—Judgment affirmed.

HUNT, Respondent, vs. MCDONALD, Intervener, Appellant.

January 12—January 31, 1905.

Liens: Homestead: Foreclosure: Vacating judgment: Application of wife to be made party: Discretion.

In an action to foreclose a mechanic's lien upon a homestead for work done under a contract with the husband, who held the title, he was the sole defendant. He defended on the ground of failure to complete an entire contract, but was defeated on the merits. The wife, though she had full opportunity, did not ask to be made a party before the trial, but applied to have the judgment vacated that she might retry the case on the same defense. *Held* that, as the contract was with the husband alone, the wife, though a proper party, was not a necessary party to the action, and under the circumstances there was no abuse of discretion in denying her application.

APPEAL from an order of the circuit court for Jefferson county: B. F. DUNWIDDIE, Circuit Judge. *Affirmed.*

This is an action to foreclose a mechanic's lien for drilling a well. The premises sought to be charged constituted the homestead of one James McDonald, and the appellant, *Carrie M. McDonald,* is his wife. The action was originally brought against James as sole defendant, and he answered, claiming that the contract under which the well was drilled was an entire contract by which the plaintiff agreed to obtain good water, and that the plaintiff failed to perform his contract, and hence was not entitled to recover. The action was tried

on the issue so formed at the June term, 1903, of the circuit court for Jefferson county, and resulted in findings and judgment for the plaintiff, establishing a lien on the premises. Afterwards, and on the 11th day of July, 1903, a motion was made by the petitioner, *Carrie M. McDonald,* before the circuit judge, at chambers, based upon a verified petition and accompanying affidavits, asking that the judgment be vacated and that she be allowed to come into the action as a party and defend the same. The petition alleged that the judgment was obtained by fraud and false swearing, and that she knew that the plaintiff's contract was to get good water, and that neither work nor materials were to be paid for in case he failed to do so. The motion was opposed by counter affidavits, and an order was made by the judge denying the motion, in which order it was recited that the petitioner had full opportunity to make her application to be made a party to the action before its trial, and allowed the same to be tried and go to judgment. Thereafter, and in December, 1903, the petitioner moved the court, upon the same papers, to reverse the order made at chambers and grant the relief prayed for in the petition. This motion was denied by the court, and petitioner appeals.

The cause was submitted for the appellant on briefs by *J. H. Page,* and for the respondent on a brief by *Edwin T. Cass.*

WINSLOW, J. This was an action brought to foreclose a mechanic's lien upon a homestead for drilling and piping a well thereon under a contract with the husband alone. The title of the homestead rested in the husband, and he was made the sole party defendant, and defended the action on the ground of failure to complete an entire contract, but was defeated after trial upon the merits. The wife, who is the petitioner here, had full opportunity to make application to be made a party before the trial of the action, but allowed the

same to be tried and go to judgment, and is now endeavoring to vacate the judgment and retry the action on the same lines of defense made by the husband. She had an inchoate right of dower in the land, and also a homestead right, which latter right was not an estate, but simply a disability of the husband. *Godfrey v. Thornton,* 46 Wis. 677, 1 N. W. 362; *Town v. Gensch,* 101 Wis. 445, 76 N. W. 1096, 77 N. W. 893. On account of these interests in the subject matter, she would have been, doubtless, a proper party to the action. *Hausmann Bros. Mfg. Co. v. Kempfert,* 93 Wis. 587, 67 N. W. 1136; *Weston v. Weston,* 46 Wis. 130, 49 N. W. 834. But as the contract to construct the well was made with her husband alone, she cannot be said to be a necessary party to an action to foreclose the lien. *Foster v. Hickox,* 38 Wis. 408. It was therefore a question of discretion whether she would be allowed to come in and defend, and we think the circumstances appearing on the application were entirely sufficient to justify the court in refusing to grant the application.

By the Court.—Order affirmed.

MANNING, Respondent, vs. SCHOOL DISTRICT NO. 6 OF FORT ATKINSON, Appellant.

January 12—January 31, 1905.

(1–4) *Pleading: Counterclaim: Construction: Reference to other portions of answer.* (5–8) *Evidence: Basis of opinion: Statements of employees: Memoranda.* (9–21) *Contracts: Substantial and partial performance: Measure of recovery: Work to be "satisfactory:" Acceptance:* Quantum meruit: *Instructions to jury.*

1. Failure by one to perform his contract with another entitling that other to a modification or extinguishment of the contract price may be pleaded as a defense or counterclaim.
2. In determining whether a complaint states a cause of action the question is not whether the pleader used the most appropriate

language to that end, but whether the language used will permit reasonably of a construction sustaining the intent of the pleader in view of the rule that all facts necessary thereto not expressly alleged which can reasonably be inferred from what is stated are to be regarded as properly pleaded.

3. It being reasonably plain that the defendant intended to plead a counterclaim, matter stated in the answer outside that portion devoted specially to the counterclaim or stated in the complaint, if referred to for that purpose directly or circumstantially, is to be regarded as incorporated in the statement of the counterclaim.

4. In applying the last rule where the plaintiff indicates that he considers the facts necessary to the counterclaim not stated in that portion of the answer specifically devoted thereto as alleged by reference directly or circumstantially to other portions of the answer or to statements in the complaint by replying, that view should prevail unless the language of the counterclaim as a whole will clearly not reasonably admit thereof.

5. It is error to strike out opinion evidence of an expert at the close of a case on the side offering such evidence, upon the ground that the detail facts upon which it was based were not given, no effort having been made by cross-examination to elicit testimony in that regard, and especially is that so where no objection is made because of such want of detail.

6. Statements of an employee as to the character of his principal's work, not made while he is authorized to represent the principal in respect thereto, are not proper evidence against such principal.

7. The report of an expert to the one employing him, though communicated to the opposite party, is not admissible as evidence in favor of the employer.

8. If a person can testify to a matter by reference to a memorandum, made by him at or about the time of the occurrence and remembered by him to have been then known to be correctly made, he may do so, though at the time of testifying he cannot, by reference to the memorandum, recall such matter to mind so as to testify from present remembrance; and the memorandum itself may also be properly received as a part of his evidence.

9. It is error to instruct that the measure of the contractor's right to recover on a contract which he has in good faith substantially performed is the contract price.

10. If one only substantially performs his contract to improve another's property, the circumstances being such that it would be impracticable for such other to reject the incomplete work, that

one can, nevertheless, if his failure to fully perform is not characterized by bad faith, recover on the contract, but the measure of his recovery is the contract price less such deductions therefrom as will measure the difference between full and partial performance.

11. The right to recover on a contract for substantial performance does not involve any judicial modification of the contract to the prejudice of the proprietor. While he may be made to respond thereon for substantial performance he is entitled to such reduction from the contract price as will, in effect, render to him that full performance called for by the contract.

12. The rule for measuring the modification of the contract price so as to account for the difference between substantial and full performance is this: So far as the imperfections can be remedied without any great sacrifice of work and material wrought into the subject of the contract, the reasonable cost of actually making good such defects is to be allowed, and so far as it is otherwise the proper allowance is the diminished value of the subject of the contract by reason thereof.

13. When one contracts with another to perform a stipulated service for such other for a stipulated price, the sum to be paid when the work shall be satisfactorily done, such other is the one to be satisfied, and until the happening of that event, so long as he acts reasonably, the contract price is not collectible.

14. The rule which permits of a recovery on a contract for substantial performance thereof, without any other acceptance of the results than such as is unavoidable, does not apply to mere partial performance.

15. Where the property and labor of a person has been wrought into the property of another resulting in a good-faith part performance of a contract, but not substantial performance thereof, the circumstances being such that the former situation cannot practicably be restored, that other is not liable at all to the contractor merely because he is enriched to the latter's loss.

16. To make one liable on a contract under the circumstances stated in the last rule, there must be the additional element of acceptance of the work other than that appropriation and use thereof necessarily involved in the use of the property of which it forms a part.

17. If one sues on a contract, he cannot recover *quantum meruit* without an amendment to the complaint setting forth a cause of action of that character.

18. In case of mere part performance of a contract and such acceptance of the result as to entitle the contractor to recover *quantum meruit*, the measure of his recovery is the reasonable value of the part performance upon a *quantum meruit pro rata* basis,

i. e., on the basis of the value of full performance at the contract rate.

19. Where one of the issues to be determined by a jury is whether the plaintiff substantially performed his contract, they should be made to understand what constitutes such performance.

20. Substantial performance means full performance in all those essentials necessary to the accomplishment of the entire purpose of the contract. Failure as to any of such essentials, whether in good faith or bad faith, or any defect so essential as that the object which the parties intended to accomplish, to have a specified amount of work performed in a particular manner, is not accomplished, is inconsistent with substantial performance.

21. That partial performance of a contract involving the incorporation of the labor and material of the contractor into the property of another so that the former situation cannot be restored, but failing to accomplish substantial performance, renders such other liable to the contractor to the amount of such other's enrichment to the contractor's loss, is not a part of our judicial system.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Jefferson county: B. F. DUNWIDDIE, Circuit Judge. *Reversed.*

Action to recover on a contract for installing a heating and ventilating plant in defendant's school building.

Plaintiff bound himself to remove the hot-air furnace in the building and place therein instead a steam boiler in working order of capacity sufficient, without waste of fuel, for a complete system of heating and ventilation for the building; to furnish and locate radiators to heat the building in connection with the ventilation to a temperature of seventy degrees during the coldest weather; to make such changes as to furnish fresh air tempered to seventy degrees to all rooms, and change the air therein at least three times an hour; to so locate the cold-air registers as to greatly improve the foul-air system of ventilation in use in the building; to furnish standard material, and to do the work in a neat and workmanlike manner, using such parts of the old heating and ventilating apparatus as could be advantageously incorporated in the

new plant, guarantying to leave the dry-closet system in use unimpaired, and to complete the whole by September 20, 1902. In consideration thereof defendant bound itself to pay plaintiff $500 upon the material for the work being delivered on the ground, $1,000 when the plant was completed, tested and found to do its work satisfactorily and in accordance with the contract, "the balance of $525 to be held by the school district board until there has been sufficient cold weather to see that the plant is satisfactory and will do the work" as agreed.

The complaint was appropriate to recover the final payment. Defendant answered, among other things, as follows: $1,500 was paid to the plaintiff, the last payment of $500 being with the express understanding that the right was reserved to determine, upon the weather being suitable for that purpose, by a proper test whether the plant was a success and in compliance with the contract. Subsequently, when there was such weather, it was demonstrated that the building could not be warmed according to the terms of the contract and that the plant was not satisfactory. The boiler proved to be too small; neither direct nor indirect radiators were sufficient; they were not of the proper size nor properly located; some of the pipes were too small and not properly arranged or covered; the distribution of heat was not such as to furnish the proper amount thereof to each room; the plant was not susceptible of being operated without waste of fuel; the ventilation of the building proved to be inadequate; the air in the rooms was not changed nor the foul air removed therefrom as agreed, and the dry-closet system was materially injured. All of these facts were pleaded as a defense, followed with this:

"Defendant further says that to make such heating plant adequate to heat such building and ventilate the same in accordance with said contract, will require a large expenditure of money, and defendant alleges on information and belief that the cost of so doing, in addition to the sum of $575 al-

ready reserved by the defendant, will amount to $500, and defendant pleads same as a counterclaim in this action."

Judgment was prayed for against the defendant for the sum of $500, with costs.

Plaintiff replied to the counterclaim, so called. The result of the trial was a verdict in plaintiff's favor for the full amount of his claim. Numerous exceptions to rulings of the trial court were preserved for review upon appeal to this court, which exceptions included all matters discussed in the opinion.

For the appellant there were briefs by *L. B. Caswell* and *Rogers & Rogers,* and oral argument by *W. H. Rogers* and *L. B. Caswell.*

For the respondent there was a brief by *Colin Wright* and *Burr W. Jones,* and oral argument by *Mr. Wright*

MARSHALL, J. There is hardly room for argument but that the breaches of contract pleaded by appellant, if established by evidence, were sufficient to modify or entirely defeat respondent's claim, and perhaps call for a judgment against him. Therefore, they were pleadable as a defense and a counterclaim as well. *Heckman v. Swartz,* 55 Wis. 173, 12 N. W. 439; *Kaukauna E. L. Co. v. Kaukauna,* 114 Wis. 327, 343, 89 N. W. 542. We shall assume the learned circuit judge appreciated that and grounded the decision that no counterclaim was stated, not upon the theory that facts sufficient to support one were not disclosed, but that they were not so stated as to comply with the statutory requisites on the subject. It really makes no difference whether the breaches of contract were stated as a defense only, or as a defense and counterclaim, so far as reducing respondent's claim is concerned, if, as alleged, he did not substantially perform his contract. In that event he could only, at best, recover the reasonable value of his work and material, on a proper basis, which were appropriated by appellant. If he substantially

but not fully complied with his contract, he could only properly recover the contract price, less such deductions as would, under proper rules for measuring the damages caused thereby, make the same good to appellant,—and no counterclaim was necessary to secure such deductions, though a claim therefor was pleadable as one. In short, all the breaches of contract alleged in the answer to the extent of defeating respondent's claim were pleadable as defensive matters, and were also pleadable as a counterclaim compelling respondent to confess or deny the same, if appellant so desired.

Do those matters disclosed by the answer, which were pleadable as a counterclaim, constitute one under the circumstances? We apprehend the court decided that in the negative upon the theory that in the paragraph of the answer suggesting the subject of counterclaim no breaches of contract were alleged expressly or by reference to the preceding allegations where such breaches were set forth as defensive matters.

In seeking out what the pleader intended we must bear in mind that "in the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed, with a view to substantial justice between the parties." Sec. 2668, Stats. 1898. "Every reasonable intendment and presumption is to be made in favor of the pleading." *Morse v. Gilman,* 16 Wis. 504. No pleading is to be condemned for want of an allegation therein of any essential fact which one can discover the pleader claimed to exist and intended to state therein, if the same can be read therefrom by reasonable inference, "though its allegations be in form uncertain, incomplete, and defective." *Miller v. Bayer,* 94 Wis. 123, 68 N. W. 869; *Ean v. C., M. & St. P. R. Co.* 95 Wis. 69, 69 N. W. 997. For example, a complaint in a case to recover on contract is to be viewed as if it merely stated the making thereof, compliance therewith, and the amount due thereon, without any particulars. Contrary to the common-

law rule, it is to be construed most strongly in favor of instead of against a pleader in case of a formal demurrer thereto (*Morse v. Gilman, supra*), and if the objection be taken for insufficiency other than by such a demurrer, for the purpose of sustaining it, it is to be viewed with still greater liberality (*Hazleton v. Union Bank,* 32 Wis. 34; *Teetshorn v. Hull,* 30 Wis. 162).

Much has been said on the subject under discussion, particularly in recent years, to the end that the great change wrought by the Code in the manner of construing pleadings might be fully appreciated. For sufficiency of facts pleaded the Code looks to the substance, not to form. Its basic principle is that the administration of justice should not be embarrassed by technicalities, strict rules of construction, and useless forms. In harmony with that the proceedings mapped out for litigants to follow were by the architects of the Code made as simple and plain as practicable. Then they provided that every pleading shall be construed as sufficiently stating everything necessary to the cause of action or defense intended, which can be found alleged therein, expressly or inferentially, looking at the language thereof in its full reasonable scope; and it was further provided that all errors in proceedings, not prejudicial, shall be regarded as immaterial. Sec. 2829, Stats. 1898. This rule was deduced in *Kliefoth v. Northwestern I. Co.* 98 Wis. 495, 74 N. W. 356, from previous decisions on the subject:

"In determining whether a complaint states a cause of action the question is not whether the plaintiff used the most appropriate language in stating his case, but whether the language used will permit a construction which will sustain the pleading, and to that end such effect should be given to its allegations as will support rather than defeat it, if that can be done without adding, by way of construction, material words not necessarily implied, or giving to the language used a meaning that cannot be reasonably attributed to it."

It is not infrequently that mere indefiniteness in a pleading

is challenged as insufficiency. The pleading may be indefinite and open to a motion on that ground, and yet its allegations be clearly susceptible of a reasonable construction sustaining it, constituting a complete answer to a general demurrer. *Miles v. Mut. R. F. L. Asso.* 108 Wis. 421, 427, 84 N. W. 159.

Now there can be no reasonable doubt but that appellant's counsel intended to plead the breaches of contract and consequences thereof stated in the defensive part of the answer as part of the statement of a counterclaim. This language is unmistakable: The cost of completing the plant, "in addition to the sum of five hundred and seventy-five dollars already reserved by the defendant, will amount to five hundred dollars, and defendant pleads the same as a counterclaim in this action; the defendant denies each and every allegation of plaintiff's complaint not hereinbefore admitted and prays judgment of this court for the said sum of five hundred dollars." True, the particulars as regards the departure from the contract were not stated in that part of the answer specially devoted to the counterclaim. But if they were necessary to be mentioned, to pass the test of sufficiency, they were all stated in detail prior thereto, followed by an allegation that they were pleaded as a defense, which was immediately followed by the language we have quoted commencing with the words "Defendant further says that to make such heating plant adequate," etc. The most formal way was for the pleader to state the breaches as a defense and then restate them as a part of the counterclaim. A good substitute for such a restatement is to refer to the prior allegations in a general way as to be deemed repeated as a part of the cause of action constituting the counterclaim. However, any reasonable indication that the breaches pleaded as a defense are intended to be also stated by way of counterclaim, under the liberal rules we have mentioned, would justify their being so regarded.

We are not unmindful of the statement in *Rood v. Taft,* 94 Wis. 380, 384, 69 N. W. 183, that without some appropriate words in that part of the answer devoted to the attempt to state a counterclaim, referring to the allegations in the defensive portion and making the same part of the statement constituting the counterclaim, they cannot be so treated. The court did not intend thereby to declare that an express reference in the counterclaim to such allegations incorporating them into the statement of the counterclaim is absolutely essential. Such a doctrine would invade the statutory rule for the construction of pleadings to which we have referred. There must be an appropriate reference, as said, but it need not be an express reference. If defensive allegations can be reasonably deemed restated as a part of the cause of action constituting the counterclaim, that is sufficient. We shall not undertake to analyze or justify what was said in *Rood v. Taft* with reference to the facts of that case. It is sufficient to say that the opinion should not be construed as holding that nothing short of words of express reference to defensive matters in the answer unmistakably incorporating the same into that part of the pleading devoted to the counterclaim will have that effect, irrespective of whether the plaintiff read the pleading as containing a counterclaim and replied thereto.

Here, as we have indicated, defendant alleged breaches of contract, following the same with an allegation that they were pleaded as a defense, following that by a paragraph denying all allegations of the complaint not theretofore admitted, and alleging that it would require expenditures to the amount of $1,075 to complete the contract, which, not only by reasonable but by necessary inference, referred to the departures from the contract before alleged. That was coupled with language to the effect that the situation rendering the expenditure of the sum mentioned necessary to complete the contract was pleaded as a counterclaim.

There is nothing in *Brauchle v. Nothhelfer,* 107 Wis. 457,

83 N. W. 653, inconsistent with the foregoing. In that case there was no allegation in the body of the complaint indicating a purpose to state a counterclaim.

In giving to a pleading, as a whole, the most favorable construction it will reasonably bear, to the end that the evident purpose of the pleader to state a counterclaim may not be defeated, some significance should be ascribed to the circumstance, when it exists, that all defects were waived by plaintiff, so far as it was competent for him to do so, by replying. Perhaps such circumstance was not given proper weight in *Rood v. Taft.* In *Irvin v. Smith,* 60 Wis. 172, 18 N. W. 722, facts not denominated as a counterclaim, but followed by a prayer for affirmative relief, regardless of the informalities, were held to contain one upon the plaintiff's indicating that he so viewed the pleadings by replying thereto, and waived the defect. In *Voechting v. Grau,* 55 Wis. 312, 13 N. W. 230, it was said that the purpose of the statute requiring facts, relied upon as a counterclaim, to be pleaded as such, is to enable the plaintiff to know to a reasonable certainty the pleader's intention; that the reason of the statutory rule fails when the plaintiff is so satisfied, though the formal requirement is not complied with, and he acts accordingly by replying. To the same effect is *Selleck v. Griswold,* 49 Wis. 39, 5 N. W. 213.

The use of the above citations must not be construed as holding that a pleading not containing facts constituting and intended to be stated as a counterclaim should be held to state one because so viewed by the plaintiff, as indicated by his replying thereto, or for any other cause. The act of replying simply waives all mere formalities and uncertainties. The counterclaim, the same as a complaint, must include in some way a statement of facts constituting a cause of action in favor of one party against the other. No fact which would be essential to a cause of action in a complaint can be properly omitted in stating the same cause in an answer, but the statement in the latter need not necessarily include a repetition of the

facts alleged as defensive matter or in the complaint. If they are referred to expressly, or inferentially, so as to make reasonably clear the purpose of the pleader to rely upon them as a part of the counterclaim, that satisfies the test of sufficiency. In short, the same rules apply to one pleading as to the other.

In *Cragin v. Lovell,* 88 N. Y. 258, the rule was laid down thus:

"A separate defense may contain all the requisite allegations within itself to make it a perfect counterclaim, or it may refer to papers annexed, or to other parts of the answer, or to the complaint, and the matters thus referred to are just as much a part of the counterclaim as if written at length therein."

That is very much the same rule as was stated in *Rood v. Taft,* 94 Wis. 380, 69 N. W. 183, but upon reading the opinion it will be seen that express reference to matters outside of that portion of the pleading devoted to the counterclaim but appearing in the pleading was not regarded as essential. The alleged defect in the counterclaim was in that it was not alleged that certain real estate was located in the state of Louisiana. The court referred to several circumstances as answering the objection, one being that it was alleged in the complaint that the land was located in Louisiana; that the answer drawn to meet that statement contained no denial thereof, which in effect admitted it and thereby incorporated the allegation in that regard into the answer. Other features of the pleading were mentioned as showing that the counterclaim, without any express mention of the fact, alleged that the realty was located in Louisiana.

Applying the foregoing to the case in hand, all matters necessary to the counterclaim not expressly stated in the paragraph devoted thereto, but otherwise appearing in the pleading, were, within the spirit of *Rood v. Taft, supra,* "by appropriate words of reference" incorporated into such counterclaim.

From the foregoing we may deduce this as a rule of plead-

ing: Matters once stated in a complaint or answer may be reasonably regarded as incorporated into that part of the answer apparently devoted to the statement of a counterclaim if referred to for that purpose, directly or circumstantially, and when the plaintiff by replying indicates that he considers them so incorporated, that view should prevail, unless the language of the counterclaim as a whole very clearly will not admit thereof.

The evidence of a witness who fully qualified himself to testify as an expert regarding the expenditure required to make the heating and ventilating plant comply with the contract was received, and at the close of the testimony was stricken out because the witness failed to state in detail the particulars of the work which would necessitate such expenditure. The theory of respondent's counsel was that the evidence was incompetent because no foundation was laid therefor in the answer and the motion ruled on was made on that ground. That was untenable, as we have seen, since a counterclaim was sufficiently pleaded. The cost of making good the departure from the requirements of the contract to the extent of defeating plaintiff's claim, was proper in any event, and the facts in that regard were pleaded as a defense. If, when the evidence of the expert was offered, upon a proper objection being made, the court in the exercise of its discretion had excluded it until the witness first stated the particulars upon which he based his conclusion, the ruling might pass without much criticism, but to receive the evidence and then strike it out, as was done at the close of defendant's case, because upon the examination in chief the basic details were not given, although there was full unimproved opportunity afforded respondent on cross-examination to go into that subject, especially when no objection was made on that ground, is plainly error.

A witness was interrogated as to circumstances leading up to the contract, and the evidence in that regard was excluded.

No reason is given why it was material, and we are unable to perceive any.

Complaint is made because a statement by an employee of respondent, who was present some of the time when the plant was being tested, as to whether it was then acting efficiently, was not permitted to be given in evidence. We assume the ruling was based on the theory that there was no satisfactory showing that the employee was authorized to represent respondent for the purpose of testing the capacity of the plant. We see no good reason for overruling the trial court on the question of competency involved.

Written reports made by the expert employed by appellant to examine the plant as regards whether it satisfied the contract, and which were sent to the respondent, when offered in evidence by appellant, were excluded. That ruling must be approved. Such reports were mere declarations in the interest of appellant made out of court. At best they were mere hearsay.

A witness who kept a diary in which he noted down from day to day the state of the weather and was able thereby to testify positively as to the temperature at a time material to the case, but could not do so other than in connection with his knowledge that when he made the memorandum he recorded the truth of the matter, was not permitted to testify on the subject upon the theory that the governing rule is to the effect that a person cannot testify by the aid of a memorandum, unless after referring thereto he can recall to mind the fact and testify from present remembrance. This court has held otherwise on many occasions, in harmony with most if not all elementary authorities on the subject. *Hill v. State,* 17 Wis. 675, 679; *Schettler v. Jones,* 20 Wis. 417; *Riggs v. Weise,* 24 Wis. 545; *Stubbings v. Dockery,* 80 Wis. 618, 50 N. W. 775; *Bourda v. Jones,* 110 Wis. 52, 85 N. W. 671; *Nehrling v. Herold Co.* 112 Wis. 558, 88 N. W. 614; 1 Greenl. Evidence, § 437; Phillips, Evidence (3d ed.) § 411;

3 Jones, Evidence, §§ 877–886. In *Schettler v. Jones, supra,* the court, speaking by DIXON, C. J., said:

"We think the sounder and better rule to be, that if the witness can swear positively that the memoranda or entries were made according to the truth of the facts, and consequently that the facts did exist, that is sufficient, though they may not remain in his memory at the time he gives his testimony. He may testify from the entries, and when he does so he swears positively to the truth of the facts stated in them."

True, the rule thus stated was not at the time of its declaration extended to a mere private memorandum, but there is no good reason for not so extending it, where the competency of the witness is clearly established by his positive testimony as to present recollection that when he made the memorandum it was in accordance with the truth as he then knew the fact to be, and so it was held in *Bourda v. Jones, supra.* The rule was there broadly stated thus:

"A witness, in testifying, may properly use a memorandum which he knew when made, or by subsequent verification thereof, to be correct, even though he does not possess present remembrance of the correctness of the matters referred to therein, after seeing the paper and examining it."

Quite as broad language as that forms the text in 3 Jones, Evidence, at § 884. This is the language used there:

"It is now well settled that a memorandum or writing may be used by the witness, not only when he can swear from actual recollection, but in some cases where the witness, after referring to such writing, can swear to a fact, not because he remembered it, but because of his *confidence in the correctness of the writing.*"

And again at § 886, as regards the use of a memorandum as an independent instrument of evidence:

"Although it is clear that the document is not admissible as evidence when it so recalls the facts to the mind of the witness that he remembers them and can testify from his act-

ual recollection, it has frequently been held that *another rule prevails when the witness,* after examining the memorandum, *cannot testify to an existing knowledge of the fact, independently of the memorandum, but can testify that,* at or about the time the writing was made, *he knew of its contents and of their truth* or accuracy."

Complaint is made because the court not only refused to permit the witness to testify by the aid of his memorandum, known by him to have been correctly made, since he had no present recollection of the facts after examining the paper, but refused to permit the paper to be introduced in evidence. The judicial idea was that the only permissible use of a memorandum is to refresh the memory of the witness. Respondent's counsel suggested to the court that the inquiry should be restricted substantially to this: "Do you remember after looking at the memorandum," etc.? That is clearly wrong, as we have seen. Not only was it permissible for the witness to testify from the memorandum when the only remembrance he had on the subject was that it was correctly made, but it was proper to receive the memorandum in evidence as part of the witness's testimony. *Bourda v. Jones,* 110 Wis. 52, 85 N. W. 671; *Nehrling v. Herold Co.* 112 Wis. 558, 88 N. W. 614. Some authorities go further, holding that in such circumstances as before suggested the memorandum may be used as an independent evidentiary instrument. *Insurance Companies v. Weides,* 14 Wall. 375; *Kent v. Mason,* 1 Ill. App. 466. This court has adopted what may be called the middle course, the one supported, as it is believed, by the great weight of authority. Mr. Jones in his work on Evidence at § 886, speaking on the subject, says: "In such cases, both the testimony of the witness and the contents of the memoranda are held admissible. 'The two are the equivalent of a present positive statement of the witness, affirming the truth of the contents of the memorandum.'" That language was fully indorsed in *Nehrling v. Herold Co., supra:*

"The rule is that a witness may refresh his recollection from a memorandum made by himself or by others, if he saw the memorandum while the facts were still fresh in his memory, and if he then knew it to be correct. In such case, if the witness cannot state the facts readily from personal recollection after using the memorandum, but can state that he knows the paper was correct when made, the paper itself may be put in evidence, and the statement of the witness and the contents of the paper together are equivalent to the present positive statement of the witness affirming the truth of the facts stated in the memorandum."

Further complaint is made because the court refused to permit proof of the reply of one of the teachers employed in the building to plaintiff's inquiry as regards the temperature in her room when he claimed he was engaged in testing the plant. The conversation between plaintiff and the teacher, so far as testified to, was drawn out on cross-examination of plaintiff. The reply of the teacher was excluded because the conversation was not a proper subject for cross-examination. On that ground, if on no other, the ruling was correct.

The court instructed the jury that if plaintiff substantially complied with the contract he was entitled to recover of defendant the balance unpaid thereon. That is not the law. The proper rule is stated in *Ashland L., S. & C. Co. v. Shores*, 105 Wis. 122, 81 N. W. 136, in effect, thus: When a contract has not been fully, but has been substantially, performed, in that it has been in good faith complied with in all essentials to the full accomplishment of that which was contracted for (*Manitowoc S. B. Works v. Manitowoc G. Co.* 120 Wis. 1, 97 N. W. 515), and the contract labor and material wrought into the property of the proprietor has been appropriated to the use intended, such contractor is entitled to recover the contract price, less such deductions therefrom as will make good to the proprietor the imperfections in the work. Such equivalent for the imperfections and the substantially completed work are regarded as affording the proprietor the full

performance of the contract to which he is entitled. So far as the imperfections can be remedied without any great sacrifice of work and material wrought into the subject of the contract and the proprietor's property, the contract price is to be reduced by so much as will measure the reasonable cost of applying such remedy, and otherwise the contract price is to be rebated to the extent of the diminished value of the subject of the contract by reason of the defects. The learned court's idea that substantial performance calls for the full contract price is entirely wrong. One who contracts with another for the erection of any structure or the installation of a plant of any kind for a stipulated price is entitled to the full benefit thereof in consideration of rendering the full price therefor. If he only receives substantial performance, he is, of course, upon proper proof entitled to such rebate from the agreed price as will constitute a fair equivalent for the difference between such and full performance of the agreement, and in an action for such price the damages mentioned are properly pleadable, either as a matter of defense or as a counterclaim. The very idea suggested by the term "substantial performance" is that the contractor has delivered something less than what he agreed to, and that the full consideration for the full price, according to the terms of the contract, being due to the proprietor as a matter of right, the courts must accord him a remedy which, in some form, will secure to him that right.

Error is assigned because the court refused to instruct the jury, at the request of appellant's counsel, as follows:

"Before the plaintiff can maintain his suit to recover this $575, the school board must be satisfied that the plant, put in by the plaintiff, is sufficient to warm the building in all its parts, in the coldest weather, to a temperature of seventy degrees,—this to be done in connection with ventilation that would also change the air in all parts of the building at least three times an hour.

"The school board would not be justified in a capricious de-

nial of its satisfaction, or in making such claim in bad faith, but the board, acting in good faith, had a right under this contract to withhold this money until they were satisfied that the plant would do the work which the plaintiff had agreed it should do. Now if you find they were not satisfied of this, the plaintiff cannot recover in this action."

The request was based on the circumstance that the third payment was payable when the plant was completed, tested, and made to work satisfactorily, and the last payment was not to be payable until the weather was sufficiently cold to demonstrate that the plant was capable of doing the work it was guarantied to do. The learned court seems to construe the word "satisfactorily" as meaning that the plant should, as matter of fact, answer the requirements of the contract in a physical sense and do the work agreed upon. Appellant's counsel contend the meaning to be that the plant should work satisfactorily to the purchaser, and insist that so long as the members of the board, acting reasonably, were not satisfied, the prime essential to the last payment being collectible was wanting. It seems to us the latter construction is the correct one. In *Parr v. Northern E. Mfg. Co.* 117 Wis. 278, 93 N. W. 1099, where a similar situation was dealt with, this court so held. There the language considered was this: "The die to be subject to our approval and not to be accepted unless it operates satisfactorily." The court said in respect thereto:

"The only meaning which can be logically attributed to this contract is that the machine was to operate satisfactorily to the defendant. . . . The respondents seem to claim that, if they could prove by the preponderance of the evidence that the machine in fact did good work, the contract has been fulfilled. This is not the law in this state. When such a contract is made, the article must be, in fact, satisfactory to the purchaser, or he is not bound to take it. . . . His dissatisfaction . . . must be real and in good faith."

It may have been thought by the learned court by reading that case that the language of the contract classed it with

those providing expressly that the subject of the sale shall be satisfactory to the purchaser; that such feature distinguished the case from this and was the controlling one. Such is not, however, the case. The court regarded the words "unless it operates satisfactorily" by themselves, as meaning, by necessary implication, satisfactory to the purchaser. That is quite plainly indicated by the language of the opinion, notwithstanding cases referred to, where the words "satisfactory to the purchaser" were used in the contract, since the case was largely grounded on this language in 1 Mechem, Sales, § 664, and supporting authorities, which were brought to the attention of the court:

"In many cases it is expressly stipulated that the sale shall not result unless the buyer is satisfied; but this express stipulation is not necessary. Where a proposition of sale is made to a person upon the condition that he need not purchase unless the article is satisfactory, the necessary inference, even in the absence of an express statement, is that he need not buy unless the article is satisfactory to him."

The following authorities support the text: *Singerly v. Thayer,* 108 Pa. St. 291, 2 Atl. 230; *U. S. Electric F. A. Co. v. Big Rapids,* 78 Mich. 67, 43 N. W. 1030; *Adams R. & B. Works v. Schnader,* 155 Pa. St. 394, 26 Atl. 745; *Brown v. Foster,* 113 Mass. 136. In *Singerly v. Thayer, supra,* the court said:

"He, therefore, was the person to decide and declare whether it was satisfactory. He did not agree to accept what would be satisfactory to others, but what was satisfactory to himself. This was the fact which the contract gave him the right to decide. . . . He was the person who was to test it and to use it. No other persons could intelligently determine whether in every respect he was satisfied therewith."

That applies very aptly to the case in hand. The agreement, in effect, was that the proper officers of the appellant should determine the question whether the apparatus was or was not satisfactory to it in view of the clause of the contract

that it should do the work satisfactorily, as regards heating and ventilation, as specified. The court ignored that very valuable feature of the contract and submitted to the jury the question which the parties agreed should be decided by appellant's officers.

There are authorities which support a different construction of such contracts as the one before us, as will readily be seen by an examination of those cited in the note to the text in Mechem which we have quoted. It seems, however, that the view taken by this court is the correct one. The natural inference from language in a sale contract stipulating that the subject thereof shall be of a specified character and be accepted and paid for only upon its proving satisfactory, is that the person to be satisfied is the purchaser; that the words "to the purchaser" or some equivalent words after the word "satisfactory" are to be regarded as a part of the contract by reasonable if not necessary implication.

Complaint is made because the court instructed the jury, in effect, that if respondent did not satisfactorily complete the contract he was yet entitled to recover the actual value of the plant as he installed it at the time of the installation thereof, less payments made by appellant. The instruction is erroneous on several grounds:

(a) There being no basis in the complaint for a recovery *quantum meruit,* none was proper without an amendment thereto. *Trowbridge v. Barrett,* 30 Wis. 661; *Thomas v. Hatch,* 53 Wis. 296, 10 N. W. 393; *Manitowoc S. B. Works v. Manitowoc G. Co.* 120 Wis. 1, 97 N. W. 515.

(b) There was no proper evidence of the reasonable value of the plant on the basis of the contract rate, supporting a claim for recovery *quantum meruit.* So there was but one course to pursue and that was to dismiss the complaint. *Manitowoc S. B. Works v. Manitowoc G. Co., supra.*

(c) In case the complaint and evidence were sufficient to support a recovery *quantum meruit,* it was error to instruct

the jury that the measure thereof was the actual value of the plant, less payments made. Such a rule, as counsel for appellant well contend, would permit the jury, upon competent evidence of the facts, to compel a purchaser to pay more for an inferior article than the contract price for a good one. The proper measure of recovery in such circumstances, as we have indicated, is the reasonable value at the contract rate, not exceeding the contract price, less payments made. *Manitowoc S. B. Works v. Manitowoc G. Co., supra; Bishop v. Price,* 24 Wis. 480; *Walsh v. Fisher,* 102 Wis. 172, 78 N. W. 437. In two of the cases cited this court quoted, with approval, from *Allen v. McKibbin,* 5 Mich. 449, 455, as a clear explanation of the foundation principle governing such situations, this language:

"A party in default can never gain by his default, and the other party can never be permitted to lose by it; and the price thus determined is the true basis of recovery on a *quantum meruit.*"

In 3 Sutherland, Damages (3d ed.) § 711, the subject is treated at length, this language being used:

"Hence the amount which may be recovered is the amount by which, were no payments made, the defendant would profit at the plaintiff's expense; that is to say, the amount which represented the fair market value of the structure which, against the wishes of the defendant, has been put upon his land. This value the plaintiff must prove before he can recover. If the contract is a beneficial one to the landowner the contractor is not entitled to recover any margin of the benefit which the former secured by the making of the contract; but the contractor is entitled to the value of the building as it is in the light of the landowner's right to have the building built, and properly built, for the contract price."

(d) The contract being entire the respondent was not, in any event, entitled to recover *quantum meruit* for mere partial performance, as a matter of course. In such a case, in the nature of things, there is no opportunity to accept or re-

ject the defective work by merely keeping it or returning it. It is incorporated into the proprietor's property in such a way as to render him substantially powerless to do otherwise than to accept whatever is delivered. In such circumstances, notwithstanding mere part performance by the contractor in good faith and some enrichment of the proprietor at the contractor's expense, under the rule prevailing in this jurisdiction there can be no recovery at all without proof of acceptance other than such as is inferable from the mere fact that the improvement is retained and used. *Manitowoc S. B. Works v. Manitowoc G. Co.* 120 Wis. 1, 97 N. W. 515; *Fuller-Warren Co. v. Shurts,* 95 Wis. 606, 70 N. W. 683; *Williams v. Thrall,* 101 Wis. 337, 76 N. W. 509; *Sherry v. Madler,* 123 Wis. 621, 101 N. W. 1095. The evidence in this case certainly did not show, as a matter of law, any election to take the plant irrespective of whether it was defective or not. So the instruction wholly ignoring that subject, or assuming there was an acceptance because appellant did what it could not reasonably avoid doing, indicates that the learned court followed authorities in other jurisdictions than our own, of which it must be confessed there are many, and respectable ones too.

The only assignment of error remaining not sufficiently covered by those already discussed is that the verdict is contrary to the law and evidence. It is manifestly contrary to the law, as we have seen, mainly because the law was not correctly given to the jury. It was also contrary to the evidence in view of the law as it should have been given to them, as we have also seen. The evidence that appellant, acting in good faith through its officers, was dissatisfied with the plant seems conclusive. There was no evidence to warrant a recovery *quantum meruit.* If the jury found that the contract was substantially performed, which is left in much doubt by the way the case was submitted, we are inclined to agree with appellant's counsel that the verdict is contrary to the evi-

dence on that point. We are unable to find any satisfactory evidence in the record that the capacity of the plant to warm the building to a temperature of seventy degrees in the coldest weather was established. The test relied upon was made when, at the best for respondent, the temperature was but a few degrees below zero,—not the coldest weather by any means liable to occur in the climate of southern Wisconsin, as abundantly appears from the evidence, and which we may well say is a matter of common knowledge.

Other points bearing on the question of whether there was substantial performance of the contract, such as that the air in the rooms should be changed three times per hour, the foul-air system and the ventilation of the building should be improved and the dry-closet system should not be impaired, we shall not refer to in detail. It is sufficient to say that if the jury had, on the evidence, found against appellant on the question of substantial performance, laying aside its right to pass on the response to the contract as to the working capacity of the plant and such response in fact, and the trial court, with appreciation of the legal limitations of that term, refused to set the findings aside, the verdict could not properly be disturbed, even if it be true, as claimed, that the evidence greatly preponderates against such finding. The agreement as to the performance of the plant when in operation in the coldest weather was the principal matter. Without some reasonable showing for respondent on that point, there is no foundation for a verdict of substantial performance. We are inclined to hold that such evidence does not appear in the record. Possibly, if it were clear that the jury, under proper instructions, found for respondent in respect thereto, and the trial court in ruling on the motion had that in mind, the verdict could not be disturbed. But the jury were not furnished any guide whatever as to what constitutes "substantial performance." The case was given into their hands for consideration in such a way that they might have reached this con-

clusion and yet believe there was no such performance. The situation of the case is such, in any view that can be taken of it, that it must be retried. Therefore it is not thought best to analyze the evidence carefully as to whether it would sustain a finding favorable to respondent, though, as indicated, we are not entirely clear on the point.

The learned court, though using the term "substantial performance" many times in the instructions as to each particular feature of the agreement, yet singularly, as we have said, failed entirely to enlighten the jury as to what was meant thereby. That is a very unsafe way to submit a case. It is very liable to result in the jury not passing upon the vital point at issue. The term "substantial performance" is by no means without limitation of a legal nature. The rule allowing a recovery on a contract for such performance is equitable in its nature. It is really a judicial invasion of strict contract right out of regard for the contractor who would otherwise, without bad faith, but through mere inadvertence, suffer great or substantial loss, and the proprietor be correspondingly enriched, perhaps obtaining for all practical purposes just what he contracted for. Being a relaxation which modifies the contract without the proprietor's consent, much care should be taken not to permit its abuse to the latter's prejudice, who is entitled, in strict right, to just what he contracted for and in the form agreed upon. To that end the jury should not be left to apply the rule without any guide. They should be instructed that "substantial performance" means strict performance in all essentials necessary to the full accomplishment of the purposes for which the thing contracted for was designed. Failure as to any of such features, whether in good faith or bad faith, any departure from the contract, not caused by inadvertence, or unavoidable omission, any defect so essential "as that the object which the parties intended to accomplish to have a specified amount of work performed in a particular manner is not accomplished,"

is inconsistent with substantial performance of the contract. *Manitowoc S. B. Works v. Manitowoc G. Co.* 120 Wis. 1, 97 N. W. 515; *Woodward v. Fuller,* 80 N. Y. 312; *Phillip v. Gallant,* 62 N. Y. 256. Care should be exercised also to distinguish between that "substantial performance" enabling the contractor to recover upon the contract, and that other such compliance spoken of in the books, furnishing a basis for relief regardless of the attitude of the proprietor as regards acceptance of the work, so long as he in fact, though unavoidably, has the benefit of what is done. The doctrine that a recovery can be had grounded upon the latter species of substantial performance prevails in many, and perhaps most, jurisdictions at this day. 3 Sutherland, Damages, § 711. It was adopted in Massachusetts as early as 1828 (*Hayward v. Leonard,* 7 Pick. 181), and has been there since firmly adhered to, as the numerous cases found cited in the text in Sutherland show. Authorities in other states that have adopted the same rule are there referred to in connection with the statement that the weight of modern authority is in harmony therewith. However, in this state if there were at any one period, as shown by the decided cases, some tendency in the same direction, it will be found that for a long period reaching up to the present time the adjudications have been in harmony to the contrary, the most recent cases being *Manitowoc S. B. Works v. Manitowoc G. Co., supra,* and *Sherry v. Madler,* 123 Wis. 621, 101 N. W. 1095.

Great caution should also be exercised, in submitting a case like this to a jury for a finding *quantum meruit,* to keep in mind, first, to authorize such a recovery the pleading, either originally or by amendment, should furnish a legitimate basis therefor; second, there must be acceptance, as before indicated, other than by doing what is unavoidable; third, the rate of recovery is not the reasonable or actual value in a general sense, but the reasonable value on the basis of the contract rate. If, for instance, a contract calls for a

structure at a price which is but fifty per cent. of the reasonable value thereof, and the contractor fails to even substantially perform, but the circumstances are such that he is entitled to a recovery *quantum meruit,* the measure thereof is *quantum meruit pro rata,* or fifty per cent. of the reasonable value of the structure in a general sense, that being the reasonable value to the proprietor under the circumstances, which is all he can be equitably required to pay.

Recapitulating, the important points to be observed on a retrial of this case are:

1. No recovery can be had on a contract, in any event, in the absence of satisfactory proof of at least *"substantial performance,"* as that term has been explained, or a waiver thereof.

2. No recovery can be had on the contract, if the defendant, acting in good faith, was not satisfied with the plant.

3. No recovery can be had for mere substantial performance, except subject to such deductions from the contract price as will make appellant good for the difference between substantial and full performance.

4. No recovery can properly be had *quantum meruit* without a basis in the pleading therefor, and without proof of actual acceptance of the work.

5. If the work was accepted so that a recovery *quantum meruit* is permissible, the amount thereof must not be on the basis of the actual value, or the reasonable value in the ordinary sense, but on the basis of the reasonable value to the appellant in view of the contract, as before indicated.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

SCHNEIDER, Respondent, vs. SCHNEIDER and others, Appellants.

January 12—January 31, 1905.

Wills: Life tenant: Consuming corpus of estate: Power of sale.

A will gave to testator's wife "all my estate . . . for her use, benefit, and control during her natural life, if she does not again marry," and provided for division of "all my said estate" after her death or in case of her remarriage. It empowered the executor and the wife to sell the real estate, with the approval of the adult children, "in case it be for the benefit of my said wife or the benefit of my estate." *Held*, that the wife took only a life estate, with no right to consume the corpus of the estate or the proceeds of any sale of realty, and that such a sale could not be made if the children disapproved

APPEAL from a judgment of the circuit court for Green county: B. F. DUNWIDDIE, Circuit Judge. *Reversed.*

The plaintiff is the widow and the defendants are the children of Wendolin Schneider, who died testate November 30, 1900, leaving, as the net result of the settlement of his estate, two parcels of real estate—one the homestead, of about $1,500 value, and the other a business lot, on which is a blacksmith shop, which rents for $14 per month, in value from $1,500 to $2,000. His will provided:

"First. After payment of my lawful debts, I give and bequeath to my wife, *Elizabeth Schneider,* all my estate, real and personal, for her use, benefit, and control during her natural life if she does not again marry. In case of her remarriage, then such use, benefit, and control shall cease, and she shall then have such provision and allowance as the laws of this state would give her had I died intestate; and the remainder of my estate shall be divided among my six children share and share alike.

"After the death of my said wife, if she has not again married, my said estate shall be divided share and share alike among my said six children, to wit: *Charles, Rosa, John, Louis,* George, and Max.

"In case it be for the benefit of my said wife or the benefit of my estate, my said real estate may be sold in whole or in part, and I hereby authorize and empower the executor of this will and my said wife to sell and convey, with the approval of my children of lawful age, any or all of such real estate."

Since his death, the plaintiff has possessed this realty and received the income. The estate of said testator was finally settled on August 7, 1901, and the executor discharged, by an order which assigned all of the real estate to the six defendants in common, "subject, however, to the life estate therein of the surviving widow, *Elizabeth Schneider,* during widowhood, and in case of her remarriage she to have her assigned dower rights in and to said premises." She brought this action, alleging insufficiency of such income to provide her and the only minor child of deceased, about eleven years old, with necessary support, and praying that the lot of land on which is the blacksmith shop might be sold through the medium of a trustee, and the proceeds of the sale applied to her benefit.

The court found the foregoing facts, as also the insufficiency of the income of the property for the support of the plaintiff, and that it was the intent of the testator, as expressed in his will, that plaintiff should have her reasonable support, care, and maintenance out of his estate as long as she remained his widow. By judgment he appointed a trustee, and ordered him, against expressed disapproval by four of the five adult children, to sell said blacksmith shop property, and out of the proceeds thereof to pay the plaintiff $250 a year for her support. From that judgment four of the defendants, who are stepchildren of the plaintiff, appeal.

Colin W. Wright, for the appellants.

J. D. Dunwiddie, for the respondent, as to the construction of the will, cited *Murray v. Kluck,* 87 Wis. 566, 572; *Paine v. Barnes,* 100 Mass. 470; *In re Stowell Estate,* 59 Vt. 494; *Winthrop Co. v. Clinton,* 196 Pa. St. 472, 46 Atl.

435; *Warren v. Webb,* 68 Me. 133; *Paine v. Forsaith,* 86 Me. 357; *Synod of Dakota v. State,* 2 S. Dak. 366, 50 N. W. 632, 635; *Lawe v. Hyde,* 39 Wis. 345, 359; *Larsen v. Johnson,* 78 Wis. 300, 307; *Price v. Bassett,* 168 Mass. 598; *Larned v. Bridge,* 17 Pick. 339; *Stevens v. Winship,* 1 Pick. 317; *Bamforth v. Bamforth,* 123 Mass. 280.

DODGE, J. The will here presented offers no field for construction. It is not ambiguous. It gives to the respondent all the estate for her life—true, "for her use, benefit, and control," but that, also, only "during her natural life." This gives clearly and unambiguously a life estate, except as reduced upon contingency of marriage—the full right to the usufruct, but only within the time limit fixed, and with no right to destroy, exhaust, or dispose of the corpus of the estate. If this purpose in the testator needed further proof, that is supplied by the words conferring the remainders. Those words give to the remaindermen "my said estate"—just that which in the interim had been held by the wife, not some residue or remaining remnant of that which she took. *Golder v. Littlejohn,* 30 Wis. 344; *Knox v. Knox,* 59 Wis. 172, 18 N. W. 155; *Jones v. Jones,* 66 Wis. 310, 28 N. W. 177; *Derse v. Derse,* 103 Wis. 113, 79 N. W. 44; *Swarthout v. Swarthout,* 111 Wis. 102, 86 N. W. 558; *Stuart's Will,* 115 Wis. 294, 91 N. W. 688.

The power of sale of realty contains no suggestion that the proceeds of sale are to be placed within the widow's right to consume. That power goes no further than to convert realty into money if the interest of the estate or the widow demand it and specified persons approve—as, for example, if the realty were unproductive of income. The proceeds would, of course, take the place of the property, and must be kept intact for the remaindermen to whom they are bequeathed. *Stuart's Will, supra.* Besides this, the power can only be

exercised if approved by certain specified persons, four of whom, at least, expressly disapprove.

Both in directing sale at all, and in authorizing consumption of any of the proceeds by the widow, the judgment is in direct defiance of the directions of the testator.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment dismissing the complaint.

SNYDER, Respondent, vs. MALONE, imp., Appellant.

January 13—January 31, 1905.

(1) *Municipal courts: Courts of record: Adjournments.* (2) *Promissory note: Wrongful transfer before delivery: Judgment: Assignment: Satisfaction.*

1. Secs. 3630, 3631, Stats. 1898, relating to adjournments in justices' courts, do not apply to the municipal court for Rock county. The character of that court as a court of record, conferred by ch. 197, Laws of 1881, is not taken away by those provisions of said chapter which vest in it the powers and jurisdiction of justices of the peace and declare that the general provisions of law relative to actions before justices shall be applied so far as appropriate.
2. A promissory note without consideration, which had not been so delivered as to become operative, was wrongfully transferred by the payee, L., to an innocent purchaser, who afterwards recovered judgment thereon against both the maker and L. The latter paid or purchased the judgment, taking a written assignment thereof. This instrument was lost and, in accordance with an agreement between L. and one R., the judgment creditor made a new assignment to R. for the purpose of transferring to him whatever interest L. had acquired in the judgment under the previous assignment. *Held:*

   (1) The second assignment conveyed L.'s interest in the judgment to R., but gave him only such rights as L. had in respect thereto.

(2) L.'s conduct, in transferring the note and permitting it to go to judgment, rendered him the principal judgment debtor and primarily liable, as between himself and the maker. His payment or purchase of the judgment, therefore, satisfied and extinguished it, notwithstanding he took an assignment, and nothing passed under the assignment to R.

APPEAL from an order of the circuit court for Rock county: B. F. DUNWIDDIE, Circuit Judge. *Reversed.*

This action was commenced in the municipal court for Rock county to recover on a promissory note executed by the defendant *Frank Malone,* and payable to the defendant A. Lorenze, who assigned it to plaintiff, *F. H. Snyder,* before its maturity. The note bears date August 17, 1899, and was for the sum of $54.28, due ninety days from date. The action was commenced by service of summons on defendants on November 24, 1899. The defendant *Malone* at no time appeared in the action in the municipal court. The defendant Lorenze appeared in the action. By agreement of the parties appearing, the case was adjourned as follows: first, from December 2d to December 11th; on December 11th, without waiting an hour, the case was again adjourned to the 14th day of December, 1899, at 1 o'clock in the afternoon, in the municipal court room. On this day, by consent of those appearing for the parties, it was adjourned to the same hour "at this office" on December 18th. On December 18th the plaintiff and defendant Lorenze appeared with their attorneys. Upon the proofs the court awarded plaintiff judgment for $56.36 damages and $8.30 costs against both defendants. On January 8, 1900, a transcript of this judgment was filed in the office of the clerk of the circuit court for Rock county.

It also appears that the note was originally given by the defendant *Malone* to the defendant Lorenze without any consideration, and that manual tradition was made of the writing under a parol agreement to the effect that Lorenze should negotiate to secure *Malone* a life insurance policy, which was

to be submitted to *Malone* for his acceptance. Lorenze has not submitted a policy which has been accepted.

After plaintiff obtained judgment against defendants, he received payment thereon in September, 1902, in full of all his rights and interest therein from the defendant Lorenze, and made an assignment thereof to the defendant Lorenze in consideration of receiving such payment. This assignment has been lost, and plaintiff, at the request of Lorenze and Edward H. Ryan, made an assignment to said Ryan, who claims to have purchased whatever interest Lorenze obtained and holds under the purchase and assignment of the judgment from plaintiff. The assignment by the plaintiff to Ryan was made September 28, 1903, and was filed with the clerk of the circuit court at once. On this same day execution was applied for by said Ryan, as assignée of the judgment, and issued out of the circuit court. Under this execution the sheriff of Rock county has levied on defendant *Malone's* real estate, and now threatens to sell the same in satisfaction thereof.

Defendant *Malone,* proceeding by petition setting forth these facts, prayed that the execution be recalled, and that the sheriff and said Ryan be restrained from proceeding further in the matter, and that the docketing of the judgment be canceled. Upon hearing on an order to show cause in the proceedings commenced by this petition affidavits were filed establishing the facts as above stated, whereon the court ruled that no cause existed for restraining proceedings under the execution. This is an appeal from such order.

J. J. Cunningham, for the appellant.

For the respondent there was a brief by *Edward H. Ryan,* attorney, and *Pierce & Fisher,* of counsel, and oral argument by *C. E. Pierce.*

SIEBECKER, J. Error is alleged upon the ground that the municipal court lost jurisdiction of the case by adjournment

without sufficient cause being shown, and that defendant *Malone's* consent was not obtained to such an adjournment, as required by secs. 3630, 3631, Stats. 1898; and also because a second adjournment was ordered without waiting an hour from the time to which the cause had been adjourned before ordering another adjournment, the parties not having appeared when the adjournment was ordered, as required by sec. 3633, Stats. 1898. These provisions regulate the practice and procedure in trials of cases in courts of justices of the peace. The question is, Do they apply to the municipal court for Rock county? This court exists as re-established by ch. 197, Laws of 1881, which provides that: "The same shall be a court of record, have a clerk, and a seal. . . . [It] may exercise powers and jurisdiction equal to and concurrent with the circuit court for Rock county in all cases of crimes and misdemeanors . . . except murder." It also has jurisdiction to try appeals in civil and criminal cases from justices' courts. It is also enacted that the general provisions of the law and the rules of practice applicable to circuit courts and actions and proceedings therein shall, so far as appropriate, apply to the municipal court, "and its rules of practice and proceedings shall conform as nearly as practicable to the rules and practice of circuit courts." It is true some provisions of the act invest the court with the powers and jurisdiction of a justice of the peace, and provide that the general provisions of law relating to such actions shall be applied so far as appropriate. We think these provisions do not take from the court the character of a court of record, but are to be construed as vesting the jurisdiction and powers of a justice of the peace in this court as a court of record, so that it possesses and exercises the powers of a court of record in all actions and proceedings within its jurisdiction. The claim that the court lost jurisdiction of this cause perforce of the statute relied upon by appellant must be denied, for these provisions do not apply to actions and proceedings

of a court of record. *Tourville v. S. D. Seavey Co., ante,* p. 56, 102 N. W. 352; *State ex rel. Le Clair v. Wright,* 80 Wis. 648, 50 N. W. 894; *Falkner v. Guild,* 10 Wis. 563; *In re Marchant's Estate,* 121 Wis. 526, 99 N. W. 320.

Was anything conveyed under the assignment from plaintiff to Ryan, since such assignment was made at the request of Lorenze under his purchase of the judgment from the plaintiff a year before? It is shown that this assignment was so made upon agreement between plaintiff, Lorenze, and Ryan for the purpose of transferring whatever interest Lorenze had acquired to the judgment under the written assignment to him, which was lost. Under these circumstances the transfer from plaintiff to Ryan operates to convey the interest of Lorenze to Ryan, and binds them as effectually as if such transfer had been made directly from Lorenze to Ryan. Ryan therefore stands in the position of, and has only the rights of, Lorenze in this judgment. The record shows that this note was originally given by *Malone* to Lorenze under an oral agreement made at the time of its execution to the effect that the note should not be deemed delivered and become operative until Lorenze should procure and submit to *Malone* a life insurance policy for his acceptance, and, if the policy was not accepted, this note was to be returned to him. It appears that no such policy was ever submitted to and accepted by *Malone,* and the note was never delivered, and is wholly without consideration as between Lorenze and *Malone.* Under such circumstances the transfer of the note by Lorenze to an innocent purchaser can in no way deprive *Malone* of his equities against Lorenze. As between them there was simply a manual tradition of the paper. No completed delivery of the instrument was ever effected by compliance with the parol agreement. The note therefore never had a legal existence or furnished the basis for a legal obligation between them. *Hillsdale College v. Thomas,* 40 Wis. 661; *Nutting v. Minnesota F. Ins. Co.* 98 Wis. 26, 73 N. W. 432;

Ware v. Allen, 128 U. S. 590, 9 Sup. Ct. 174; *Mendenhall v. Ulrich* (Minn.) 101 N. W. 1057; *Burke v. Dulaney,* 153 U. S. 228, 14 Sup. Ct. 816; *Green v. Russell,* 132 Mass. 536. Entry of judgment on the note in no way changes the legal relationship of the original parties to the transaction. The equities which attach to the note between these defendants follow the claim when put into judgment. The equitable rights between the original parties are therefore properly before the court upon the undisputed facts in this proceeding, for Ryan, as assignee of Lorenze, has no rights other than Lorenze had at the time of the transfer. The legal effect of Lorenze's conduct in wrongfully transferring the note and of permitting it to go to judgment against himself and *Malone* renders him in law the principal judgment debtor, and primarily liable as between him and *Malone;* and his payment of it to plaintiff, as judgment debtor, operated to satisfy and extinguish it, notwithstanding he took a formal assignment. *German Am. S. Bank v. Fritz,* 68 Wis. 390, 32 N. W. 123; *Montgomery v. Vickery,* 110 Ind. 211, 11 N. E. 38; *Knopf v. Morel,* 111 Ind. 570, 13 N. E. 51; *National S. Bank v. Hunnewell,* 124 Mass. 260; *Booth v. Farmers & M. Nat. Bank,* 74 N. Y. 228; *Tompkins v. Fifth Nat. Bank,* 53 Ill. 57. The judgment having been fully satisfied and extinguished, nothing existed to pass under the transfer by Lorenze to Ryan. The petitioner should have been awarded relief by recalling the execution issued on the judgment, and vacating all levies made under it, and by satisfying the judgment of record.

By the Court.—The order of the circuit court is reversed and the cause is remanded with directions to award petitioner relief in accordance with this opinion.

SMITH, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

January 13—January 31, 1905.

Limitation of actions: Personal injuries: Notice: Service: Waiver: Estoppel: Railway claim agent.

1. The provision of subd. 5, sec. 4222, Stats. 1898, that the notice of personal injuries therein mentioned "shall be given in the manner required for the service of summons in courts of record," is mandatory, and no other manner of service can be substituted.
2. Letters from a railway company's claim agent to plaintiff's attorney relating to plaintiff's claim on account of personal injuries cannot be held a waiver of the notice required by subd. 5, sec. 4222, Stats. 1898, or as an estoppel to insist that such a notice was necessary, where it does not appear that such agent had any authority to waive the notice, nor that anything was said or done by him indicating or leading plaintiff to believe that no further notice would be required.

APPEAL from an order of the circuit court for Rock county: B. F. DUNWIDDIE, Circuit Judge. *Reversed.*

This action was commenced against defendant, a railroad corporation, to recover for personal injuries alleged to have been sustained by plaintiff. The complaint alleges that the injuries were sustained on the 7th day of February, 1899, while plaintiff was a passenger on defendant's road; that shortly after the injury considerable correspondence was had between the plaintiff's attorney and defendant's claim agent, Hinsey, concerning the injury, and that notice of the injury was given to Hinsey; that after full investigation of the claim, and on June 2, 1899, Hinsey denied liability, and refused to pay; that the action was not commenced until more than four years after injury; that Hinsey had the management of all claims against defendant and authority to settle or compromise the same; but it does not appear that he had any authority to waive notice of injury, nor does it appear

that notice of the injury was given to defendant in the manner provided for the service of summons in courts of record. Defendant demurred to the complaint for the reason, among others, that no notice of injury was given. From the order overruling demurrer this appeal is taken.

The cause was submitted for the appellant on the brief of *H. H. Field* and *Thos. S. Nolan,* and for the respondent on that of *Wm. Smith* and *H. L. Maxfield.*

KERWIN, J. The only questions presented are: first, whether notice of injury served upon Hinsey, claim agent, was sufficient; second, if not, whether notice had been waived.

1. The first question turns on the construction of subd. 5, sec. 4222, Stats. 1898, which reads as follows:

". . . No action to recover damages for an injury to the person shall be maintained unless, within one year after the happening of the event causing such damages, notice in writing, signed by the party damaged, his agent or attorney, shall be served upon the person or corporation by whom it is claimed such damage was caused, stating the time and place where such damage occurred, a brief description of the injuries, the manner in which they were received and the grounds upon which claim is made and that satisfaction thereof is claimed of such person or corporation. Such notice shall be given in the manner required for the service of summons in courts of record. . . ."

This statute is clear and unambiguous, and if its words be given their plain, obvious, and ordinary meaning there can be no room for doubt that the legislature intended notice should be given in the manner provided for the service of summons in courts of record.

"It is beyond question the duty of courts in construing statutes to give effect to the intent of the lawmaking power, and seek for that intent in every legitimate way, but . . . first of all in the words and language employed; and if the words are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of in-

terpretation." Sutherland, Statutory Construction, § 237; *Newell v. People ex rel. Phelps,* 7 N. Y. 9; *Ogden v. Glidden,* 9 Wis. 46; *Battis v. Hamlin,* 22 Wis. 669; *Mundt v. S. & F. du L. R. Co.* 31 Wis. 451; *Boland v. Gillett,* 44 Wis. 329; *Gilbert v. Dutruit,* 91 Wis. 661, 65 N. W. 511.

If the words of a statute are plain they must be strictly followed, but if they are ambiguous the whole context must be looked to for their explanation. Potter's Dwarris, 126.

"When the meaning of a statute is clear, and its provisions are susceptible of but one interpretation, that sense must be accepted as the law. Its consequences, if evil, can only be avoided by a change of the law itself, to be effected by the legislature, and not by judicial construction." Sutherland, Statutory Construction, § 238.

The legislature in the statute in question here used words of plain and definite import, and to put a construction upon them different from the ordinary meaning of the words used would be holding that the legislature did not mean what it has expressed. The statute plainly provides that service of notice shall be made in the manner provided for the service of summons in courts of record. These words cannot be construed to mean that the service "may" be made in some other manner without doing violence to the express language of the statute.

It is claimed by respondent that the word "shall" is directory, and may be construed to mean "may," and several cases are cited where the word "shall" used in statutes has been held to mean "may;" but this doctrine does not apply to the case at bar. Sutherland, Statutory Construction, § 460.

"Where an existing right or privilege is subjected to regulation by a statute in negative words, or those which import that it is only to be exercised in a prescribed manner, the mode so prescribed is imperative." Sutherland, Statutory Construction, § 459; *State on complaint of Doerflinger v. Hilmantel,* 21 Wis. 566, 574.

The statute in question imposes a positive limitation or regulation upon the right to commence actions for personal

injuries, and provides that notice shall be served within one year, and served in a specified manner. Such provision is imperative and not permissive. If, under this statute, any other or different service than that clearly provided for can be made, the plain language of the statute will be defeated. Whether this statute is a wise one, or whether some other service might not be as effectual, is not a question for the courts. Where the statute is plain and unambiguous, and there is no room for doubt as to the intention of the legislature, it is the duty of the court to enforce it. *Newell v. People ex rel. Phelps,* 7 N. Y. 9; *Gilbert v. Dutruit,* 91 Wis. 661, 65 N. W. 511. Mr. Justice MARSHALL, in *Gilbert v. Dutruit, supra,* quoting Vattel, says:

"It is not allowable to interpret what has no need of interpretation. When the meaning is evident, and leads to no absurd conclusions, there can be no reason for refusing to admit the meaning which the words naturally present. To go elsewhere in search of conjecture in order to restrict or extend the act would be but an attempt to elude it. Such a method, if once admitted, would be exceedingly dangerous, for there would be no law, however definite and precise in its language, which might not, by interpretation, be rendered useless."

It is quite obvious that the legislature intended to provide a plain and certain manner for the service of notice in personal injury cases, and, the statute being positive and explicit, its provisions cannot be dispensed with or any other manner of service substituted. *Sowle v. Tomah,* 81 Wis. 349, 51 N. W. 571; *Curry v. Buffalo,* 135 N. Y. 366, 32 N. E. 80; *Atkinson v. C. & N. W. R. Co.* 93 Wis. 362, 67 N. W. 703; *Borst v. Sharon,* 24 App. Div. 599, 48 N. Y. Supp. 996.

2. It is claimed, however, by respondent that the correspondence between attorney of plaintiff and defendant's claim agent amounted to a waiver of any other or further notice. It does not appear from the record that Hinsey waived the notice provided by statute, nor that he had any authority to do so. The alleged waiver is pleaded as an estoppel, but all

the elements of estoppel appear to be wanting. Nothing was said or done by Hinsey indicating that no further notice would be required, nor does it appear that plaintiff was misled by the acts of defendant, or induced to believe that no other notice would be required. We are therefore unable to discover anything from the record which would justify the court in holding that there was a waiver of the notice required. *Borst v. Sharon,* 24 App. Div. 599, 48 N. Y. Supp. 996; *First Nat. Bank v. Wood,* 26 Wis. 500.

It follows from what has been said that the statute in question is mandatory, and requires the service of notice in the manner provided for service of summons in courts of record, and that such service had not been waived. The complaint, therefore, fails to state a cause of action, and the order overruling the demurrer should be reversed.

By the Court.—The order of the court below is reversed, and the cause is remanded for further proceedings according to law.

SONNENBERG, Plaintiff in error, vs. THE STATE, Defendant in error.

January 13—January 31, 1905.

Bastardy: Support of child prior to judgment: Instructions to jury: Payment of costs: Bond.

1. Sec. 1535, Stats. 1898 (under which one found guilty of bastardy is to be charged in the judgment with the *future maintenance* of the child and also "for the care and support of such child since its birth"), does not change the rule which obtained prior to the revision of 1878 (under statutes providing for the *maintenance* of the child) that defendant is to be charged with such maintenance from the birth of the child onward.
2. An instruction that before the jury could find defendant guilty they must be satisfied that he had sexual intercourse with the complainant during a time in which, in the ordinary course of nature, the child could be begotten, was not erroneous.

3. An instruction that the guilt of defendant must be proved beyond a reasonable doubt, but if the jury believe the testimony of the complainant and her statement that she did not have intercourse with any other man, and that it is proved beyond a reasonable doubt that the defendant is the father of the child, they should find him guilty, was not erroneous.
4. A judgment in bastardy proceedings requiring defendant to pay the costs "forthwith," means as soon as they are taxed, and delay in the taxation for two weeks is not prejudicial.
5. Allowing defendant twenty days in which to give the bond required by the judgment is not error of which he can complain.

ERROR to review a judgment of the circuit court for Jackson county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

The plaintiff in error, *William Sonnenberg,* was charged with being the father of the bastard child of Matilda Sterns, born July 11, 1903. Issue being joined and trial had, the jury, at the close thereof, returned a verdict finding the defendant guilty. Thereupon judgment was entered wherein it was adjudged and determined, in effect, that the said *William* was the father of the bastard child of which the said Matilda was delivered July 11, 1903, which child was still living and in the care and possession of its mother; that the said *William* stand chargeable with the future support and maintenance of said child until she should arrive at the age of eighteen years; that he pay or cause to be paid to the complainant, Matilda, for such support, maintenance, care, and keeping $8 per month from July 11, 1903, payable quarterly on the 1st days of November, February, May, and August in each and every year thereafter until the said child should arrive at the age of fourteen years—$8 per month to date from July 11, 1903, to July 11, 1917—the first payment to be made on the 1st day of November, 1903, for the term from July 11, 1903, to November 1, 1903, at the rate stated, and thereafter such payment to become due at the end of each and every three months; that the said *William* pay or cause to be paid to the complainant for the care, support, and main-

tenance of the said bastard child from July 11, 1917, until July 11, 1921, the sum of $50 per annum, payable in instalments of $12.50 each on the 1st days of November, February, May, and August in each and every year thereafter until the said child should arrive at the age of eighteen years; that the said *William* forthwith pay or cause to be paid to the said complainant $28 for medical attendance during her confinement, as stipulated in open court, and also $3.46 for clothing and wearing apparel theretofore purchased for said child, as stipulated in open court; that *William* forthwith pay the costs and disbursements of the prosecution, taxed and allowed at $81.60; that the said *William* well and truly execute within twenty days from and after the rendition of such judgment his undertaking, with two good and sufficient sureties, who should each justify in the sum of $1,000, to be approved by the court, running to the supervisors of the town of Melrose, in Jackson county, in which town said Matilda had a legal residence, and the conditions thereof should be for the performance of such judgment, and for the payment of the several sums therein directed to be paid for the future support and maintenance of said child, and payment of all sums therein ordered and directed to be paid, said bond to be in the sum of $1,000; that upon compliance with all the terms and conditions of the judgment and the fulfilment of all requirements made and ordered to be made and done by the said *William* he should be relieved and discharged from any further liability thereunder, and that upon his failure to perform each or any of the provisions of said judgment as to the amount and time of the several payments and any other requirement made therein, he, the said *William,* be committed to the county jail of Jackson county until he should comply with and perform said conditions, or the conditions and provisions of such judgment, or should be otherwise discharged according to law. To reverse such judgment the accused has sued out this writ of error.

For the plaintiff in error there was a brief by *Pope & Pope,* and oral argument by *Carl C. Pope.*

For the defendant in error there was a brief by the *Attorney General* and *Walter D. Corrigan,* second assistant attorney general, and oral argument by *Mr. Corrigan.*

CASSODAY, C. J. There is no contention as to the facts in this case.

1. Error is assigned because the judgment, among other things, charged the accused with the support, maintenance, care, and keeping of the child from the day of its birth, July 11, 1903, to the day of the rendition of the judgment, October 28, 1903. The contention is that the present statute (sec. 1535) only made the accused chargeable in the judgment with the child's "future maintenance;" that is to say, its maintenance after the rendition of the judgment. It is conceded that under the statutes as they existed prior to the revision of 1878 this court had frequently held that the judgment should provide for the maintenance of the child from its birth onward. *Owen v. State,* 12 Wis. 559; *Hoffman v. State,* 17 Wis. 596; *Jerdee v. State,* 36 Wis. 170; *Speiger v. State,* 32 Wis. 400; *Rindskopf v. State,* 34 Wis. 217. These cases fully sustain the concession. In this last case it was held that:

"The statute vests a large discretion in the circuit court in regard to the amount which the defendant shall be required to pay in such cases for the support of the child, and the court may properly consider the wealth of the defendant, as well as the condition in life of the complaining witness."

The present statute on the subject is a combination of certain provisions of two sections of the Revised Statutes of 1858 as amended (secs. 6, 7, ch. 37, R. S. 1858; sec. 2, ch. 108, Laws of 1862). See Revisers' Notes. Sec. 6 provided that, if the accused should be found guilty, he should "be adjudged to be the father of such child," and should "stand chargeable with the maintenance thereof in such sum

or sums or in such manner as the court" might "direct, and the payment of all the costs of prosecution." Sec. 7 required that the bond to be given by the accused should also include, among other things, for the payment of all expenses for the lying-in, and "for the care and support of such child prior to the giving of such bond." The present statutes made the matter more plain, and declared that:

"If the accused shall be found guilty, . . . he shall be adjudged to be the father of such child, and shall stand chargeable with its future maintenance, in such sum and in such manner as the court shall direct, and also for all expenses incurred by such town or county or by the mother of such child for the lying-in and attendance of the mother during her sickness and also for the care and support of such child since its birth, and for the costs of the prosecution. All which matters shall be ascertained and fixed by the court, and shall be inserted in the judgment." Sec. 1535, Stats. 1898.

The right to include in such judgment payment "for the care and support of such child since its birth" down to the rendition of the judgment seems to be thus expressly provided for. *Baker v. State,* 65 Wis. 50, 26 N. W. 167, arose after the revision of the statutes in 1878, and the judgment expressly provided "for the care and support of said bastard child since its birth," and the judgment was affirmed. See Cases and Briefs, vol. 222. The opinion of the court in that case was written by Mr. Justice TAYLOR, one of the revisers of the statutes; and, had any change been made or contemplated, he certainly would have known it. But it is obvious that no such change was considered.

2. Error is assigned because the court charged the jury that:

"You must be satisfied that the defendant had sexual intercourse with this girl during a time which, in the ordinary course of nature, the child could be begotten, before you can find a verdict of guilty."

We perceive no error in this portion of the charge. Certainly it was not prejudicial to the accused. Error is assigned because the court further charged the jury that:

"In a bastardy case the defendant is presumed to be innocent until the contrary is proved. The guilt of the accused must be proved beyond a reasonable doubt. If you have a reasonable doubt of the guilt of this defendant, it will be your duty to render a verdict of not guilty. But if you believe the testimony of the complainant, and her statement that she did not have intercourse with any other man, and that it is proved beyond a reasonable doubt that the defendant is the father of this child, then it will be your duty to render a verdict accordingly for the state—of guilty."

We perceive no error in this portion of the charge. It authorized a verdict of guilty only in case it had been proved to the jury beyond a reasonable doubt that the accused was the father of the child; and, in order to be so convinced, it was necessary for the jury to believe the testimony of the complainant and her statement that she did not have intercourse with any other man.

3. Error is assigned because the judgment required the accused to "forthwith pay the costs and disbursements of this prosecution, taxed and allowed at $81.60." As indicated, the statute expressly authorized such judgment. The criticism is that such costs were not taxed until some two weeks after the rendition of the judgment, and hence could not be paid forthwith. Manifestly, the judgment only required the costs to be paid forthwith after they were legally ascertained. Certainly the accused was not prejudiced by the delay.

4. Error is assigned because the court allowed the accused twenty days within which to give the bond required by the judgment. But, as indicated, the statute quoted gives the court a large discretion in such matters, not only as to fixing the amount for which the accused shall stand chargeable, but also as to the time and manner in which it is to be paid or

secured; and all such matters are necessarily to be ascertained and fixed by the court. The statute required the bond to be "conditioned for the performance of such judgment," and naturally was to be given after the rendition of the judgment. Sec. 1536, Stats. 1898. The twenty days within which the accused was at liberty to give the bond was for his benefit, and he is in no position to complain because it was not required at the time the judgment was rendered. We perceive no reversible error in the record.

By the Court.—The judgment of the circuit court is affirmed.

JAMES, Plaintiff in error, vs. THE STATE, Defendant in error.

January 13—January 31, 1905.

Criminal law: Rape: Information: Surplusage: Verdict: Certainty: Evidence: Physicians: Privilege: Confessions: Review: Bill of exceptions.

1. Upon an information charging in one count both rape and assault with intent to rape, a verdict of "guilty as charged" is not uncertain, the charge of assault with intent to rape being mere surplusage, since it is necessarily included in the charge of rape.
2. Information acquired by a physician in the examination of a child who was brought to him after an alleged rape, not for treatment, but for the sole purpose of determining whether she then had a venereal disease from which defendant was suffering at the time of the alleged offense, was not privileged under sec. 4075, Stats. 1898.
3. Offers of settlement and confessions of guilt made by defendant after his arrest, and not induced by either threats or promises, were not rendered inadmissible in evidence by the fact that he had asked the officer in charge of him whether he had better make an offer to settle, and the officer had replied that he would not advise him to settle anything of which he was not guilty.
4. It being claimed that the child alleged to have been raped had contracted a venereal disease from defendant, evidence for the

defense as to reputation of the mother's house, in which the child lived, was not admissible in the absence of anything to show that defendant could or expected to prove that the mother was a prostitute and herself afflicted with such a disease, which she might have communicated to the child.

5. Neither the charge of the trial court nor its rulings in respect thereto being preserved in a bill of exceptions, alleged errors in such charge cannot be reviewed on writ of error.

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BRAZEE, Judge. *Affirmed.*

J. H. Stover, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *Walter D. Corrigan,* assistant attorney general, and oral argument by *Mr. Corrigan.*

WINSLOW, J. The plaintiff in error was convicted of the crime of rape upon a girl under the age of fourteen years, and prosecutes a writ of error to reverse the judgment.

The information charged in one count both assault with intent to rape and rape itself. The verdict was, "Guilty as charged," and the first contention is that the verdict is indefinite and uncertain, because two different crimes are charged, and, the verdict being general, it cannot be ascertained of which crime the plaintiff in error has been convicted. *Hogan v. State,* 30 Wis. 428. This contention must fail, because the premises are unsound. The charge of assault with intent to commit rape is mere surplusage. It is necessarily included in a charge of rape. The information charging both crimes is therefore no different, in legal effect, from an information charging rape alone. Upon an information charging rape alone a general verdict of guilty as charged is in no way indefinite or uncertain, and hence such a verdict is not uncertain in the present case.

The child who is alleged to have been raped was taken by her mother to Dr. Bradley a few days after the alleged offense, to be examined for the purpose only of determining whether

she then had a venereal disease, it appearing that the plaintiff in error was suffering from that disease at the time of the alleged rape. The doctor was called on the stand, and was allowed to testify, against objection, as to the results of his examination, and this ruling is assigned as error on the ground that the information obtained by the doctor was privileged under sec. 4075, Stats. 1898. The ruling was correct, because such information is privileged only when required and obtained for the purpose of enabling the physician to prescribe for the patient as a physician or act as a surgeon. *In re Will of Bruendl,* 102 Wis. 45, 78 N. W. 169.

Testimony was received, against objection, showing certain offers of settlement and confessions of guilt made by the plaintiff in error after he was arrested, and error is alleged because it is claimed that these offers and statements were not voluntarily made. Before the evidence was received, affirmative evidence was introduced, showing that neither threats nor promises were used to induce the making of the statements. It is true that it appears that the plaintiff in error asked the officer having him in charge whether he had better make an offer to settle the matter, and the officer replied that he would not advise him to settle anything he was not guilty of; but we are unable to see how this remark can be reasonably construed as holding out any inducement either of hope or fear, and hence we find no error in the ruling.

The evidence showed that the child in question lived with her mother, who was a witness for the state. A witness for the defense was asked in his direct examination whether he knew the reputation of the mother's house as to being an orderly or disorderly house, and an objection to this question was sustained. It is now claimed that this ruling was erroneous, because it might have appeared that the mother was a prostitute and herself afflicted with venereal disease, and so that the child might have caught it from her mother. It is sufficient to say that there was no statement made by counsel showing

that the defendant could or expected to prove any such fact. Certainly, in the absence of any offer of this kind, the objection was very properly sustained.

Errors in the charge of the court were also alleged in the brief, but, as neither the charge nor the rulings were preserved in the bill of exceptions, these alleged errors cannot be considered.

By the Court.—Judgment affirmed.

HOLMES, Plaintiff in error, vs. THE STATE, Defendant in error.

January 13—January 31, 1905.

Criminal law and practice: Assault with intent to kill: Self-defense: Evidence: Instructions to jury.

1. Upon the evidence in this case (sufficiently stated in the opinion) it is *held* that the jury were warranted in finding that the shooting of a person by defendant was with intent to murder, and not in lawful self-defense.
2. On a trial for assault with intent to murder, there being evidence that defendant harbored ill will not only against the person assaulted but also against the other employees of the same establishment, evidence of threats made by defendant against any of them, even as long as nine months before the assault, was admissible to show his purpose in visiting such establishment, armed with a revolver, at the time of the assault.
3. The jury were charged that, in order to convict, they must find, first, that defendant assaulted the person named, second, that defendant was armed with a dangerous weapon, and, third, that the assault was made with intent to murder said person; but were told that as to the first and second elements of the crime there was no dispute, defendant having admitted that he shot said person with a revolver. *Held*, that this could not have misled the jury to understand that a criminal assault was admitted or undisputed, especially as they were afterwards carefully instructed on the subject of unlawful assault as something distinct from the assault as to which there was no dispute.

4. Although the court had not yet instructed the jury on the subject of justification for the shooting, an instruction that if they found defendant guilty "under the instructions so far given" they should return a verdict accordingly, was not error, where the jury had just been told that they should find defendant guilty unless they found the shooting "was justifiable under the rules which will hereafter be given to you by the court," and proper instructions were thereafter given on that subject.
5. It was not error for the court to state to the jury that the prosecution "claims there is some evidence tending to prove" certain facts, and to instruct the jury in respect thereto, where there was in fact a basis in the evidence for such claim.
6. The mere occurrence of a previous affray in which defendant had been ejected from a building did not justify his shooting of one of his assailants after he was entirely free from them.
7. An instruction that the taking of human life "cannot be justified on some slight appearance of danger. Nothing short of actual pressing necessity to the apprehension of the defendant will justify the taking of human life in self-defense," was faulty in that it was not qualified to the effect that one may kill his assailant if he believes and has reasonable ground to believe that he is in imminent danger of receiving some great personal injury at the hand of such assailant.
8. The omission, however, to explain to the jury what constitutes a "pressing necessity" was not error, in the absence of any request by defendant for such explanation; and the omission of the requirement of a reasonable ground for belief in such necessity, was favorable to defendant and therefore not an error which should work reversal.

ERROR to review a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

The plaintiff in error was charged with having committed the offense of assault with intent to murder George Walter. He pleaded not guilty. The trial resulted in his conviction as charged. The evidence established, or tended to prove, this situation: George Walter, Sr., was the owner of a brewery property at the time of his death, which occurred in 1899. He left surviving a widow and nine children, two of such children, Martin and George, being of mature years. For some time after his death, plaintiff in error, *John G. Holmes,* worked in the brewery as an employee of Mrs. Walter, who

had charge of the business for herself and children. He and Mrs. Walter during such time associated together so as to scandalize her and her family in the opinion of Martin and George, resulting in their becoming very hostile to him and causing his discharge. The intimacy between *Holmes* and Mrs. Walter continued thereafter, against the strenuous opposition of her said children, resulting in their becoming man and wife. George was employed at the brewery at the time of the occurrence in question, and for a considerable period theretofore he had charge of the boiler room. Martin worked some of the time in the brewery, and some of the time he was away at school. The employees to a considerable extent joined with the Walter boys in hostility to *Holmes,* creating such a state of things that the latter's presence in or around the brewery was liable to cause more or less disturbance. On that account Christian Walter, who, because of the facts aforesaid, became the manager of the brewery, prohibited *Holmes* from visiting the property. He was also ordered to keep away from the premises by the Walter boys.

For some time before the occurrence in question the feeling between *Holmes* and the Walter boys was so bitterly hostile that the former knew his presence at the brewery property was liable to lead to a breach of the peace. He made threats of personal violence to the Walter boys, the bookkeeper at the plant, A. J. Schmidt, and the trustee of the property, Christian Walter. He visited the property on the day in question armed with a revolver secreted about his person. He entered the boiler room where George was working, and was immediately ordered to leave. He refused to go, whereupon George caused Martin to be sent for, who speedily arrived, and the two assaulted *Holmes,* treating him quite roughly by pulling him down upon the boiler room floor and striking and choking him. The assault lasted some little time without any serious injury to *Holmes* being produced, when he was finally ejected from the room. The boys followed him outside

thereof, continuing to admonish him to leave and keep away from the premises. He indicated a willingness to comply and apparently started to do so, whereupon George turned to go back to his work. The movements of the two placed George nearly with his back towards *Holmes,* who quickly drew his revolver and shot George in the back, the course of the bullet as it entered the body being towards a vital part. George fell forward when the bullet struck him and *Holmes* immediately turned his weapon in the direction of Martin and fired at him. He used language when the shooting commenced and immediately thereafter indicating that his intention was to use the revolver with fatal effect.

On many of the points above mentioned the evidence was more or less conflicting. *Holmes* denied having made the threats testified to. He said that his purpose in going to the brewery was to find one of his wife's children, as she requested him to do; that when he entered the boiler room he explained his purpose to George and upon being roughly ordered away he protested, saying in effect that there was no occasion therefor or for any trouble, but started to leave, when he was assaulted by both boys and misused substantially in the manner testified to by them as above detailed. He said that after he left the boiler room and was trying to safely leave the premises the boys followed him up, while accomplices among the employees were near at hand acting in such a manner as to impress him that he was in danger of being assaulted, not only by the boys, but their associates; that one of the latter approached George with an iron bar in his hands, or a weapon with iron on it, apparently to assist George, and that as he got near enough to the latter to enable him to take the weapon he turned apparently to do so, and thinking he intended therewith to make a deadly assault, he (*Holmes*) drew his revolver and fired the first shot. Seeing Martin immediately raise his hands as if to throw something at him he fired in his direction to scare him.

There were exceptions to rulings on evidence and instructions and there was also an exception to a refusal to set aside the verdict as contrary to the law and the evidence.

For the plaintiff in error the cause was submitted on the brief of *A. M. Spencer,* attorney, and *Henry D. Ryan,* of counsel.

For the defendant in error there was a brief by the *Attorney General* and *Walter D. Corrigan,* second assistant attorney general, and oral argument by *Mr. Corrigan.*

MARSHALL, J. A contention made on behalf of the plaintiff in error that the verdict is not sustained by the evidence seems to deserve but brief treatment. Sufficient is disclosed in the statement to indicate clearly that the jury had ample room for reaching the conclusion which they did. Counsel hold up to view the story of *Holmes* as to the occurrences characterizing his conduct on the occasion in question as a demonstration that he used his revolver in lawful self-defense—instead of challenging the sufficiency of the evidence tending to establish the offense charged to warrant the verdict, as should be done in such a situation. If the evidence in any reasonable view thereof which the jury had a right to take justifies the verdict, that is sufficient on a motion to set it aside as contrary thereto. There is ample evidence in the record showing that after the affray in the boiler room the accused went therefrom and was free to go from the premises undisturbed; that he knew the Walter boys and their associates supposed that he had fully submitted to their insistence that he should leave the premises, and presently, at least, he was not in danger of being interfered with, unless he invited it; that George so regarded the situation and turned to go back to his work, while *Holmes* started, seemingly, to leave the grounds, but took such a direction as to place himself near to and in the rear of George, as related in the statement, when he suddenly drew his revolver and shot George, accompanying his act by ex-

pressions strongly suggesting a premeditated design to kill. Martin Walter's evidence as to the circumstances of the shooting, which seems to be well corroborated by other witnesses, is, in the main, as follows:

Holmes went out straight from the boiler house ten or twelve feet. George told him to get off the property. After they talked some minutes he said he would go. He was then three or four steps from George. The latter replied, "That is all we want of you." George then turned and walked two or three steps towards the boiler house door, while *Holmes* started, apparently, towards Lawrence street. As the two made such movements *Holmes* passed in the rear of George and not far from him, when he pulled out his revolver and shot George, at the same time using some "cuss words." He then turned on me and fired, saying "You too!" It is useless to argue in the face of such testimony given by several witnesses, in connection with the undisputed fact that the shot fired at George was directed towards a vital part of his person, that the jury were not warranted in finding that the act was characterized by intent, on the part of *Holmes,* to take human life, and not by lawful defense of his person.

The evidence abundantly shows that the manager of the brewery property, Christian Walter, and the employees under him, including the Walter boys, were hostile to *Holmes* and were of one mind in respect to prohibiting him from frequenting the premises, and that he reciprocated such hostile feeling. It abundantly appears that he knew the feeling of the Walter boys towards him was so intense that they were resolved to use force, if necessary, to prevent his coming upon the property. For the purpose of showing that when he went to the brewery on the day in question he knew, or had good reason to believe, his conduct was liable to cause a breach of the peace, and that he went, nevertheless, armed with a revolver and determined to use it upon the Walter boys or anybody interfering with his movements, papers in a judicial

proceeding, which had been served upon him, prohibiting him from entering the brewery or frequenting the premises, were received in evidence. For the same purpose evidence was received as to his having made threats to severely injure Christian Walter about five months prior to the assault, A. J. Schmidt, the bookkeeper, about the same time, and Ernest Eick and others, including the Walter boys, about some nine months before the assault. The testimony as to Christian Walter was stricken out. A question is raised as to whether, if the reception of the testimony was error, striking it out, under the circumstances, remedied the mischief. Further question is raised as to whether the evidence of Schmidt was proper, no ground of impropriety being suggested, and also as to whether the testimony of the witness Eick was not improper because of remoteness. It is suggested on the part of respondent that no proper exception was preserved to the ruling as to Schmidt's evidence, and that in any event all the evidence was proper, and with that we cordially agree. It all had a material bearing on what the intent of *Holmes* was in visiting the boiler room and using his revolver under the circumstances before related. As we have seen, the evidence strongly indicates that he harbored ill will not against George Walter alone, but against the whole brewery outfit, or at least against the significant figures thereof. Under the circumstances, his conduct as to any of them was evidentiary of his purpose in visiting the property, armed as he was on the day in question. No sufficient answer is made to that phase of the case insisted upon by respondent.

We are referred to *Paulson v. State,* 118 Wis. 89, 94 N. W. 771, as in point, language from the opinion being quoted to the effect that in a criminal prosecution evidence of general bad character, or the commission of other specific acts than the one in question, should not be permitted, "*except when so connected with the offense that their connection directly tends to prove some element of the alleged offense.*" The ex-

ception is a conclusive answer to the contention of counsel for plaintiff in error. It is because the conduct of *Holmes* as to each person mentioned in the evidence complained of, including the Walter boys, sprang from ill will toward all, and was so connected with the offense charged as to directly prove criminal intent, which was vital to the maintenance of the charge in the information.

Complaint is made because the court instructed the jury in these words:

"In order to convict, it will be necessary to find from the evidence, beyond a reasonable doubt, three things: First: An assault on George Walter by the defendant. Second: That the defendant was armed with a dangerous weapon. Third: That such assault was made with the intent on the part of the defendant to kill and murder George Walter. Now with reference to the first and second of these elements or ingredients of this crime, there is no dispute. The defendant admits he fired the shot from the revolver which struck George Walter, and that is not denied in any way. The fact of the assault was present or is present, so as to the first two of these points I say there is no question."

It is said it is not true that there is no question but that the accused assaulted George Walter; that the term "assault" in law is a wilful attempt to do bodily harm to another and involves a wrongful purpose. Counsel evidently fail to appreciate the distinction between the offense of assault, which involves a wrongful purpose, as suggested, and does not involve necessarily actually reaching the assaulted person, and the term "assault" in its mere lexiconic sense, which means the doing of violence by one to another, which may or may not include the element essential to criminality. The distinction is plainly noted in all law and general dictionaries. The court unmistakably used the term in the latter sense, because the assault spoken of, as clearly indicated, consisted of the act of shooting George Walter, disassociated from all circumstances rendering the same unlawful. That is further clearly

indicated by the fact that later in the charge the jury were carefully instructed on the subject of unlawful assault as something distinct from the assault said to have been established beyond controversy. It is not within reasonable probability that the jury were at all misled by the language counsel criticises, although the manner adopted by the court in his instruction of presenting the case to the jury does not meet with our unqualified approval. The better way would have been to state that the first two essentials mentioned were established beyond reasonable controversy, to the extent that defendant was present on the occasion in question armed with a dangerous weapon, and that he, in fact, with such weapon shot George Walter.

Error is further assigned because the court instructed the jury:

"If you find defendant guilty as charged in the information under the instructions so far given you by the court, of course that is the end of your labors in this case, and you will return such a verdict."

It is said that such instruction is erroneous because the court had not, up to the time it was given, informed the jury as to all questions essential to be passed upon unfavorably to the accused in order to justify a conviction; that he had not instructed the jury on the subject of justification for the act of shooting. True, it would have been a more logical treatment of the case to have given the instruction on that matter before using the language complained of, but proper instructions were afterwards given in respect thereto and such reference was made to the same before the use of such language that the jury were unmistakably told that such added instructions were to be deemed included in the term "under the instructions so far given to you by the court." Just prior to the use of those words the court said: "You should find him guilty as charged in the information, unless you find that such shooting was justifiable under the rules which will here-

after be given to you by the court." That plainly, in effect, placed the instruction on the subject of justification before the language excepted to.

Further error is assigned in the giving of this instruction:

"The state claims that there is some evidence tending to prove that the defendant, in going upon the brewery premises and into the building where George Walter, the complaining witness, was, under the circumstances under which he did enter and with the knowledge of the unfriendly relations existing between himself and the two Walter boys, George and Martin, voluntarily went into said building where the complaining witness was, with the intent and for the purpose of provoking an affray or a difficulty with said George Walter, and there so conducted himself as to bring on the assault and affray as it took place in the boiler room. The court instructs you that if you believe and find from the evidence that the defendant did so, that is to say, that he voluntarily entered and went into said boiler room with the intent and for the purpose of provoking an affray and difficulty with said George Walter, there so conducted himself as to bring on the assault and affray as it took place in the boiler room, that he, the defendant, is not entitled to the plea of self-defense. And the assault and battery which took place in the boiler room cannot excuse or justify the shooting which took place outside the boiler room."

True, the prosecution claimed as stated and there was a basis in the evidence therefor. We cannot discover anything wrong in that. Doubtless the instruction is correct, that the mere occurrence of the affray in the boiler room did not justify the shooting of George after the accused was entirely free from him, as the evidence conclusively shows he was.

Lastly, complaint is made of the giving of this instruction:

"The taking of human life is a matter of such terrible significance that it cannot be justified by some slight appearance of danger. Nothing short of actual pressing necessity to the apprehension of the defendant will justify the taking of human life in self-defense, or an assault with the intent to take human life in self-defense. The danger which will jus-

tify killing, or an assault with intent to kill, must be actual, pressing, urgent, to the apprehension of the defendant, and if the defendant, *Holmes,* was in fault in creating the situation of danger, his right of self-defense did not arise until he had done his utmost to avoid the necessity of shooting the assailant."

It is said that there was no evidence tending, in any view of it, to prove that *Holmes* was at fault in creating the situation of danger which he claimed led to the shooting. Enough has been said to show that counsel is clearly in error on that point. Further, it is contended that the instruction is faulty because the words "cannot be justified on some slight appearance of danger. Nothing short of actual pressing necessity to the apprehension of the defendant will justify the taking of human life in self-defense," were not qualified as required by the rule in *Perkins v. State,* 78 Wis. 551, 47 N. W. 827, to the effect that under the circumstances stated in the instructions one may kill his assailant, if he believes and has reasonable ground to apprehend that he is in imminent danger of receiving some great personal injury at the hand of such assailant. Doubtless, the instruction is faulty as contended. It is suggested that the form used by the learned court should not be adopted in future cases in the same or in other jurisdictions. However, it seems that the error was harmless. The jury were told that one may rightly take human life when he himself has not created the necessity therefor, if to his apprehension there is a pressing necessity therefor. True, there must be such pressing necessity, and so far the charge was right, though what constitutes such necessity should have been explained to the jury, but it was not error to omit to do so, since no request in that regard was made on behalf of the plaintiff in error. True, also, the "pressing necessity" spoken of must be to the apprehension of the person assaulted, but he is not justified in killing his assailant without there being still another element. There must be reasonable ground to

believe that such necessity exists. As the learned court left the question, a person may be justified in killing another whether such person has any reasonable ground to believe there is a pressing necessity therefor, so long as he in fact believes there is. No further analysis of the instruction complained of is necessary to demonstrate that while it was erroneous, the error was in favor of the accused, which, of course, does not furnish any legitimate basis for reversing the judgment. *Fertig v. State,* 100 Wis. 301, 310, 75 N. W. 960.

The foregoing covers all questions of any importance suggested for our consideration. The record is free from any harmful error whatever, and the judgment must be affirmed.

By the Court.—The judgment is affirmed.

DAMKOEHLER, Appellant, vs. CITY OF MILWAUKEE, Respondent.

October 22, 1904—February 21, 1905.

Municipal corporations: Street improvements: What are "abutting lots:" Rights of nonabutting owners: Negligence in doing work: Removal of lateral support.

1. In sec. 2, ch. VII, of the Milwaukee city charter—sec. 5, ch. 388, Laws of 1889—(providing that the grading, etc., of any street "shall be chargeable to and payable by the lots fronting or abutting upon such street," etc.), the phrase "lots fronting or abutting upon such street" includes only the property which borders on the street being improved.
2. Thus, the owner of land between which and the street in question there is a strip 5.8 feet wide, being part of the same lot but owned by another person, is not chargeable with any part of the cost of improving such street, and, not being a party to the improvement proceedings, cannot rely upon any defect or irregularity therein as a ground for the recovery of damages for injury to his premises resulting from the doing of the work. The nonabutting owner does not have the same right of action, in such a case, as that which, *under the statute,* accrues to the abutting owner.

3. But where in such a case, through negligence of the city authorities in doing the grading, the street was excavated to such a depth that the intervening strip and also a part of the land of the nonabutting owner subsided and fell into the street, there was, in effect, a taking of said owner's property for public use, and the city is liable to him for the injury directly resulting from such unlawful invasion of his premises.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

This is an action to recover damages for injury to plaintiff's property, resulting from the acts of the city of *Milwaukee* in grading Hadley street, a public street of the city. The premises in question are described as the east 112.50 feet of lot 6 and lot 7 in block 8 in Wechselberg & Elliott's Subdivision of Lots C and D in the Thirteenth Ward of the city of Milwaukee, except the north 5.80 feet thereof, which part borders on the south limits or line of Hadley street, and lies between this street and plaintiff's premises. The premises front on Island avenue, a public street of the city, which intersects Hadley street at right angles, runs north and south, and lies to the east of plaintiff's property. Plaintiff became owner of the premises in 1895, and has owned them ever since.

The city graded Hadley street in 1894 and 1895, and it is claimed that such grading was unlawfully done and without authority of law. The grading is alleged to have injured plaintiff's property through the unlawful digging up, excavating, removing, and carrying away of the earth from this street to a depth of from eight to twenty feet in parts of the street adjacent to these premises, and it is alleged that this grading, excavating, and removing of the earth from the street removed the natural banks and lateral support of lot 6, and caused the 5.80 feet strip and a large portion of plaintiff's part of lot 6, above described, to subside and slide into the excavated street, to plaintiff's injury and damage. The grading causing this result is alleged to have been negligently and carelessly done

by the city, through its authorized officers and agents. The grading and excavating was done to change the natural surface of the street and bring it to the grade which had been established by the city council. It did not involve the change of any former grade in the street. It appears that the work was done under a proceeding by the city to improve Hadley street, pursuant to the authority vested by charter in the city for the improvement of streets, and to charge the cost of such improvement upon the abutting real estate.

The action was tried before the court. No bill of exceptions is certified to this court. It appears from the record before us that at the conclusion of the testimony the court decided that the attempted proceeding by the city for the improvement of this street at the expense of the abutting owners was defective and void, but that it was not a defect going to a want of authority to make the improvement and charge plaintiff's premises for a proportionate share of the cost, and that the defect in proceeding was curable under the provision of a reassessment law. Thereupon the court ordered that the city proceed to make such reassessment under the law which authorizes reassessments of benefits and damages in cases of such attempted street improvements, and stayed all further proceedings until otherwise ordered.

The fact that plaintiff's premises do not abut on Hadley street is not controverted. The court entered an interlocutory judgment, upon findings as above indicated, staying all proceedings, and allowing the city the right of reassessment of benefits and damages under the proceeding instituted for the improvement of the streets. This is an appeal from such judgment. The decision on the motion for a new trial was held in abeyance by the court, as not necessarily to be determined at this stage of the action.

For the appellant there was a brief by *Hamilton, Van Wyck & Silber,* and oral argument by *C. H. Hamilton* and *Howard Van Wyck.*

For the respondent there was a brief by *Carl Runge,* city attorney, and *R. S. Witte,* assistant city attorney, of counsel, and oral argument by *Mr. Witte.*

The following opinion was filed December 13, 1904:

SIEBECKER, J. It is an uncontroverted fact upon the record before us that plaintiff's premises do not front or abut upon Hadley street. A strip of land 5.80 feet in width lies between Hadley street and the portion of lot 6 owned by the plaintiff. This situation of her premises leaves them removed from the southerly margin of Hadley street by the width of this strip. The defendant's charter (sec. 2, ch. VII) provides that "grading, graveling, and planking, macadamizing, or paving to the center of any street or alley . . . shall be chargeable to and payable by the lots fronting or abutting upon such street [or] alley, . . . to the amount which . . . [it] . . . shall be adjudged . . . to benefit such lots." The city sought to charge upon plaintiff's premises, as an abutting owner, a proportionate share of the cost of this improvement, under the power conferred by this section of its charter. Is plaintiff such an owner under these provisions? An examination of these provisions and those on kindred subjects in the charter leads us to the opinion that it was intended to include within the phrase "lots fronting or abutting upon such street [or] alley" only the property which borders on the street or alley being improved. *Jenkins v. Rock Co.* 15 Wis. 11; 1 Am. & Eng. Ency. of Law (2d ed.) 224. Since plaintiff's premises did not border on Hadley street, no liability could attach to charge her premises with part of the expense. Under these circumstances she was not an interested party to the proceeding for the improvement of this street and the payment of its cost by abutting owners, and she therefore cannot rely on any defect or irregularity in the proceeding as a ground for the recovery of damages for injury to her premises. The liability of abutting owners for a proportionate

share of the cost of such improvements gives them the right to insist on compliance with the provisions of the charter to which the city is restricted in making them. A failure on the part of a city to follow the prescribed course of procedure for the exercise of this power is deemed a violation of the abutting owner's statutory right, and constitutes a legal ground for the recovery of damages resulting from the unauthorized acts of the city. This has been repeatedly ruled in cases before this court, cited in the recent case of *Waukesha v. Randles,* 120 Wis. 470, 98 N. W. 237. Since no cause of action can arise in plaintiff's favor on account of any failure by the city to comply with these charter provisions, any discussion of the subject of a reassessment under the statutes in cases of this nature is unnecessary. They obviously cannot apply, for plaintiff's property is not within the assessing district of this improvement.

It is argued that, if plaintiff has no cause of action upon this ground, she has a cause of action at common law for damages caused by the negligent and wrongful conduct of the city's officers and agents in grading and excavating the street. She avers that the grading, excavating, and removing of the material from that part of Hadley street bordering on the strip of lot 6 lying between her premises and this street was carelessly and negligently done by removing the earth within the street, which laterally supported the border strip of lot 6, to the depth of from fifteen to twenty feet, causing this strip and the plaintiff's premises adjoining it to subside and fall into the excavated street, and undermine the foundations of her house to an extent which necessitated its removal to prevent its destruction by falling. It is asserted that this conduct by the city's representatives was an unlawful invasion of her property rights, and resulted in a taking of her property for public use, for which compensation should be made.

In respect to the rights of adjoining proprietors, the laying out of streets and the opening and preparing of them for

public use and travel are municipal functions, within the corporate duties of municipalities, as distinguished from their purely public or governmental duties, imposed on them as agents of the government. In the performance of these corporate duties a city is held responsible for the consequences of any unlawful acts of its officers and agents, while no liability attaches "for torts committed by its officers in the discharge of merely public or governmental duties." This distinction in responsibility has not always been observed in the cases cited to our attention as ruling this case under the conflicting contentions of the parties. There is no conflict in the adjudications in this court upon the proposition that the careless and negligent discharge of a corporate duty by the city's officers and agents renders it liable for the proximate damages resulting therefrom. In the recent case of *Bunker v. Hudson,* 122 Wis. 43, 99 N. W. 448, the cases are collected and cited to this doctrine. See, also, *Durkee v. Kenosha,* 59 Wis. 123, 17 N. W. 677. Other cases brought to our attention are of the class holding that municipalities are not liable for consequential damages resulting to property from raising or lowering the grade of a street, and that such grading is not a taking of private property for public use, within the meaning of the constitution, if the municipality act under authority of law in making the change of grade, and exercise due care, unless so made by some statute or constitutional provision. This doctrine was examined, and the former cases in this court upon the question affirmed, in *Smith v. Eau Claire,* 78 Wis. 457, 47 N. W. 830, and *Colclough v. Milwaukee,* 92 Wis. 182, 65 N. W. 1039.

It is contended by respondent that this case comes within the principle as ruled in *Alexander v. Milwaukee,* 16 Wis. 247. The *Alexander Case,* however, differs widely in its facts from this one. That was an action to recover the damages resulting from the action of the water which it was alleged was driven onto complainant's premises by the winds

through a channel cut by the city from Lake Michigan to the Milwaukee river, which bordered on complainant's land. In passing opinion on this case the court says:

"The case presents the simple question whether appellant can recover for such consequential damages thus resulting to his property from the city making the harbor improvement, a work it was specially authorized to do, and done without any negligence and in a proper manner."

It was held that no part of the premises, under the facts of the case, was taken for public use, and that no grounds of liability existed; but the court expressly declares that it does not wish "to be understood as asserting the doctrine that there must be an actual taking or appropriation of the property itself in order to entitle the owner to compensation for damages done him. The city might so build a bridge, or open a street, or excavate a canal along or upon a lot, only appropriating a small portion of it, or perhaps none of the land itself, and yet entirely destroy the value of the property for all purposes." The instant case, in its facts, comes within the exception so distinguished by the court, and cannot be held to be ruled by the decision of that case.

As appears from the statement of facts, the defendant city did excavate Hadley street to the depth of from fifteen to twenty feet adjacent to plaintiff's premises, and this caused a considerable part of her land to subside and fall into the street. A municipality has the undoubted right to improve and grade its streets by filling up or excavating the natural surface of the ground within the street limits, but the exercise of this right is subject to the qualification that in the performance of this duty it cause no unnecessary damage to an adjoining landowner, resulting from a want of ordinary care in making the improvement, or from a physical invasion of such owner's property, thereby depriving him of it and devoting it to the public use. The removal of the lateral support of the soil of premises bordering on the limits of a high-

way, in making highway improvements, to the extent of causing a substantial part of the adjoining owner's land to subside and fall so as to injure the premises so affected, is an actual appropriation of the soil to the extent of such injury, and amounts to a taking of it for public purposes. Such conduct of a municipality is, in effect, an actual taking of property, resulting from an invasion of private property rights. We perceive no valid reason for exempting municipalities from responsibility for invasions of this kind when performing their proprietary functions and duties. The right of a landowner to have his property protected against an excavation which will cause it to subside is a part of his property in the land, alike in nature and importance to the right of user or of exclusion, and a deprivation of the right is a taking of property as much as an actual appropriation of the soil.

Viewing the case in the light of plaintiff's rights and the corresponding responsibilities of the city, it must follow that the acts of the city were a violation of her right by a physical invasion of her premises outside the limits of the street, and the injury suffered by her was the direct result of these unlawful acts, for which the city is liable in its corporate capacity. This result is in accord with the cases of *Pettigrew v. Evansville,* 25 Wis. 223, and *Bunker v. Hudson,* 122 Wis. 43, 99 N. W. 448. In the former case the city was held liable for invading plaintiff's rights by causing the water collected in the street to be conducted onto his premises, as amounting to a taking of private property for public use. In the latter case the city invaded the property of plaintiffs by placing earth on the land bordering on the limits of the highway in constructing an embankment for the improvement of the street. In passing opinion on the question of the city's liability under the circumstances it is said: "It is difficult to conceive a plainer case for corporate liability. In grading the street the city was doing one of the things which, as a

municipal corporation, it was authorized to do. That work was done in an improper and negligent manner, so as to invade the right of the plaintiffs, not as members of the public, but as adjoining proprietors. For proximate damages thus caused liability results according to principle, and without conflict of authority." Cases in other jurisdictions supporting this view are *O'Brien v. St. Paul,* 25 Minn. 331; Elliott, Roads & S. § 495; *Schroeder v. Joliet,* 189 Ill. 48, 59 N. E. 550; *Stearns v. Richmond,* 88 Va. 992, 14 S. E. 847.

Our attention is directed to the fact that the case of *Radcliff's Ex'rs v. Mayor,* 4 N. Y. 195, has been referred to and approved by this court in its decisions, and that the doctrine of that case is in conflict with the rule holding the defendant liable in this case. True, the case is referred to and approved as supporting the decisions of the cases wherein it is cited, but these cases do not conflict with the principle applied to the instant case. In so far as the *Radcliff Case* enunciates any rule in conflict therewith, it must be disregarded and disapproved. We are not unmindful that other jurisdictions hold that damages resulting from landslides caused by excavations on highways in the course of improving them for public use are purely consequential, and not recoverable by the owner. We find the doctrine of liability under such circumstances more consonant with reason and justice, and therefore follow it in this case.

The court submitted two questions in the special verdict, finding, in effect, that plaintiff was the assignee of the cause of action sued on, and assessing her damages at the sum of $687.50. After verdict and before judgment defendant moved to set aside the verdict and for a new trial, and also asked that further proceedings in the action be stayed and a reassessment be ordered. The court ordered a reassessment, directed the entry of an interlocutory judgment, and stayed all proceedings in court, and held in abeyance the motions to set aside the verdict and for a new trial. Since the judgment

appealed from must be reversed upon the grounds stated in the opinion, it follows that the case must be remanded with directions that the order directing reassessment be vacated, and that the court proceed to pass upon the motion for a new trial.

By the Court.—It is so ordered.

Upon a motion for a rehearing there was a brief for the respondent by *Carl Runge,* city attorney, and *R. S. Witte,* assistant city attorney, and a brief for the appellant by *C. H. Hamilton.*

The motion was denied February 21, 1905.

KERWIN, J., took no part in the decision of this case.

HAUBNER, Respondent, vs. CITY OF MILWAUKEE, Appellant.
HAUBNER, Respondent, vs. CITY OF MILWAUKEE and another, Appellants.

October 22, 1904—February 21, 1905.

(1) *Actions: Consolidation: Order of trial.* (2–7) *Municipal corporations: Special assessments for street improvements: Validity: Reassessment: Right of abutting owner to damages: Milwaukee city charter.*

1. Refusal to consolidate an action against a city to recover for injury to plaintiff's lot by the cutting down of the street in front thereof with an action against the city, its treasurer, and the contractor, to set aside a special assessment certificate issued for such work to said contractor, and for other relief, is *held* not to have been error; nor was it error to direct the trial of the action at law first, immediately followed by that of the suit in equity, the court having control of both cases at the same time.
2. An assessment by the board of public works of the benefits and damages to abutting lots by reason of the grading of a street in

Milwaukee was made without separate consideration of the several lots, although they were very differently affected by the improvement; it was not made at the time of viewing the premises, but at a different time and in the office of the board; and it assessed a uniform sum per front foot as benefits along the whole street, and awarded no damages whatever for injuries. *Held*, that under the city charter such assessment was void.

3. By sec. 1210*e*, Stats. 1898, as amended by ch. 354, Laws of 1903, a reassessment is provided for in every case where a special assessment for street improvement is held invalid by reason of defects in the assessment of benefits and damages, whether such invalidity be determined in an action at law or one in equity.
4. The amendment to sec. 1210*e*, Stats. 1898, by ch. 354, Laws of 1903, whereby a reassessment was provided for in legal as well as in equitable actions, was applicable to actions thereafter commenced, although the assessments complained of were made prior to its enactment.
5. Although an abutting lotowner has no right, either by statute or at common law, to recover for damage to his land resulting from the original grading of the street done lawfully and regularly, yet where the city fails to proceed in the manner prescribed by law it becomes liable for the damage proximately caused to such owner by the improvement.
6. The right of the lotowner in such a case to recover for the damage to his land could not be taken away by a subsequent amendment (ch. 354, Laws of 1903) of the statute relating to reassessment of benefits and damages; but no constitutional right of the lotowner is invaded by the provision, in such subsequent statute, for a reassessment of the amount of benefits which he ought to pay to the city, and a reassessment so provided for should be ordered in his action to recover for the damage, upon the original assessment being held invalid.
7. If, in such a case, relating to land in the city of Milwaukee, the benefits as ascertained by such reassessment are less than the legal damages to which the lotowner is entitled, the difference is to be paid to him out of the proper ward fund.

APPEALS from judgments of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

On November 5, 1903, the plaintiff, as owner of lot 6 in block 13, having a frontage on Fifth street of fifty feet, commenced this action at law in the superior court of Milwaukee

county to recover damages for cutting down the street in front of his lot and thereby injuring his premises. The complaint alleges, among other things, in effect, that March 14, 1900, the city, by ordinance, permanently established the grade of Fifth street from Burleigh street (being the street next south of the plaintiff's lot) north to Ring street and beyond, several blocks north of the plaintiff's lot; that by such grade the center of Auer avenue (being the first street north of plaintiff's lot) was twenty feet higher than the center of Burleigh street, and the south line of Ring street (which is the first street north of Auer avenue) was forty-three and one half feet higher than Burleigh street; that May 19, 1902, the board of public works recommended the grading and macadamizing of Fifth street; that July 14, 1902, the common council, by resolution, directed the board of public works to improve Fifth street, as recommended, from Chambers street (being the first street south of Burleigh street) to Ring street; that August 25, 1902, the board transmitted to the common council its assessment of benefits and damages to the lots fronting on Fifth street between Chambers street and Ring street by reason of such improvement, dated August 15, 1902, reciting that it viewed the premises August 6, 1902, and that the benefits to the plaintiff's lot No. 6 were $175 (that is to say, $3.50 per front foot), and his damages nothing; that the benefits to each and all the lots on both sides of Fifth street between Burleigh street and Ring street were assessed therein at $3.50 per front foot, and no damages were assessed to any of said lots; that such assessment was unlawful, arbitrary, and not made on view of the premises, nor, as to the effect of the grading, as to each lot or piece of land separately, but was falsely and arbitrarily made, as mentioned, at the office of the board, without personal inspection, and without considering the damage to the lots, respectively, and such assessment was based solely upon the cost of the improvement per front foot; that the board well knew that the plaintiff's lot

would be injured at least to the extent of the special assessment certificate to be issued thereon, and for such injury no consideration or allowance was made; that the original surface of the center line of Fifth street between Burleigh and Ring streets varies more than forty-two feet from a level; that on the east line of Fifth street such variation is more than thirty-seven feet, and on the west line of such street such variation is 43.49 feet; that the grading of Fifth street in question varies from the fill of five or six feet to a cut of from ten to twelve feet along various parts thereof, but that the board made a uniform assessment of benefits of $3.50 per front foot, and awarded nothing for damages or injury; that August 30, 1902, the common council adopted such assessment, and thereafter let the contract for such improvement to the contractor, the defendant Froemming in the equity suit hereinafter mentioned, under and in pursuance of said assessment, and by the authority and direction of the city he proceeded to do the work; that such work was so negligently and improperly performed that the plaintiff's approach to his lot along the entire front was blocked and shut off by a vertical wall of earth from eight to ten feet in height, to the plaintiff's great damage; that the cost of cutting and filling in front of the plaintiff's lot was $79.80, and all other fifty-foot lots varied from $4.20 to $86.70. Judgment is prayed for $2,000 as damages.

On January 21, 1904, the defendant answered such complaint by way of admissions, denials, and counter allegations. February 13, 1904, the plaintiff commenced an action in the circuit court to annul the assessment certificate, and to cancel and set aside the same, and for an injunction. June 4, 1904, the defendant served its answer in such equity suit so pending in the circuit court. June 10, 1904, the action at law was called for trial in the superior court. Thereupon the defendant asked leave to amend its answer, setting up the pendency of the equitable action in the circuit court, and asked that the venue of the action at law be changed to the circuit court for

the convenience of witnesses, under subd. 3, sec. 2622, Stats. 1898. The plaintiff objected to such change of venue, and offered to accept the amended answer and to proceed to trial at once; and thereupon the defendant amended its answer in the action at law by alleging the pendency in the circuit court of the equity suit against the city and its treasurer and one Froemming, the contractor. The court then stated that both cases ought to be tried by the same judge; that the party who was ready was entitled to proceed with his case first. It was then stipulated in open court that the venue of the equity suit be changed to the superior court for trial as soon as an order to that effect could be made. The court then directed counsel to proceed with the trial of the action at law, which had already been called. The defendant then expressed a desire to try the equity suit first, to which the plaintiff objected; and the court concluded to try the law case first, and then dispose of the equity case afterwards. Thereupon the court and jury, without objection, viewed the premises. The defendant then asked that the cases be tried together and consolidated, which motion was denied, and the court stated that the cases would be tried together—that is, the trial of the equity case would follow the trial of the law case,—with which the defendant's attorney expressed himself satisfied.

Thereupon the action at law was tried on the 10th and 13th of June, 1904, and at the close of the trial the jury returned a special verdict to the effect (1) that the property of the plaintiff was depreciated in value by the grading of Fifth street; (2) that the difference in value of such property immediately before and immediately after such grading was $200. Such verdict was filed June 14, 1904. June 13, 1904, the same court and judge entered upon the trial of the equity suit. June 18, 1904, the court ordered judgment on the special verdict in the action at law for $200, with costs and disbursements to be taxed. July 2, 1904, the defendants moved for a stay of proceedings therein, and that the court order a

reassessment, and the same was denied, to which the defendants excepted. July 6, 1904, judgment was entered, filed, and docketed on such verdict for the amount stated. July 7, 1904, the same court filed its findings of fact and conclusions of law, based upon the same evidence as in the action at law, and the facts found are substantially as alleged in the complaint in the action at law, and above stated; and, in addition, the court found to the effect (11) that the plaintiff's lot was not benefited by such grading and improvement of Fifth street, in excess of the injury to his premises, but, on the contrary, such injury was in excess of all benefits derived therefrom; (12) that the contractor completed his work under the contract, and the city issued and delivered to him a certificate of the board of public works for the work so performed, which certificate was a lien upon the plaintiff's lot, but that the contractor had, before the commencement of this action and service of the injunctional order herein, in good faith and for value received, duly sold, assigned, and transferred the same, and all his right, title, and interest therein, to a third person, unknown to the court, in whose hands the same now is.

As conclusions of law the court found, in effect, (1) that the assessment of benefits and damages was wholly arbitrary and without authority of law, and was illegal and void; (2) that the city and the contractor were without jurisdiction to grade and improve the street as prescribed by the resolution of the common council; (3) that the damages sustained by the plaintiff by reason thereof were in excess of any benefit derived therefrom; (4) that the certificate issued to the contractor was so issued without authority, and was void, and should be delivered up for cancellation; (5) that the city and its treasurer should be permanently restrained from selling, or offering or attempting to sell, the plaintiff's property by reason of such certificate or any proceedings under said assessment; (6) that the plaintiff was entitled to judgment for a permanent injunction against the city and its treasurer, and

that the certificate be declared null and void, together with costs and disbursements to be taxed,—and ordered judgment to be entered accordingly. Judgment was so entered July 7, 1904, and on the same day the city and its treasurer brought this appeal; and the city also on the same day appealed from the judgment so entered in the action at law.

For the appellants there were briefs by *Carl Runge,* city attorney, and *R. S. Witte,* assistant city attorney, and oral argument by *Mr. Witte.*

For the respondent there were briefs by *Hamilton, Van Wyck & Silber,* and oral argument by *C. H. Hamilton* and *Howard Van Wyck.*

The following opinion was filed December 13, 1904:

CASSODAY, C. J. 1. Error is assigned because the court refused to consolidate the action at law with the suit in equity, and also refused to try the equity suit first. No such question was suggested until after the superior court had entered upon the trial of the action at law, nor until after the city had asked and obtained leave to amend its answer, setting up the pendency of the suit in equity in the circuit court, and the city had sought and failed to have the venue in the action at law changed to the circuit court, and the venue in the equity suit had, by stipulation, been changed to the superior court. What occurred in respect to the matter is fully set forth in the foregoing statement, and need not be here repeated. The action at law was simply for damages, and against the city alone. The suit in equity was against the city, its treasurer, and the contractor, and the prayer was for different relief. The court had stated that the two "cases ought to be tried by one and the same judge." The court fully appreciated the close relationship between the two cases, and entered upon the trial of the suit in equity immediately upon the action at law being submitted to the jury. Of course, the court had control of the verdict, and so of both cases at the same time. The

order in which they should be tried was certainly within the discretion of the trial court. Secs. 2647, 2844, Stats. 1898. The fact that the action at law was first tried did not prevent the court from doing justice to the parties in both cases. We find no reversible error in refusing to consolidate the two actions, nor in trying the action at law before the suit in equity.

2. It is found by the court, in addition to what is stated above, and is undisputed, that the excavation in front of the plaintiff's lot was from six to ten feet, leaving a vertical wall of earth of that height along the entire front thereof; that all the lots fronting on the street in question, between Burleigh street and Ring street, except one lot 250 feet north of the plaintiff's lot, were assessed at a uniform rate per front foot; that the estimated expense of grading the several lots having a frontage of fifty feet varied from $4.20 to $86.70; that such expense in front of the plaintiff's lot was $79.80; that in making the assessment the several lots were not separately considered and benefits and damages assessed to each lot; that the assessment was not made at the time of viewing the premises, but at a different time and at the office of the board; that the grade of the street in question varied from a fill of six feet to a cut of twelve feet, along various parts thereof; and that the board made a uniform assessment of $3.50 as benefits per front foot along the entire line of the street in question, and awarded no damages for injury whatsoever. Under the decisions of this court, construing the charter of the city, there can be no question but that such assessment was void. *Kersten v. Milwaukee,* 106 Wis. 200, 81 N. W. 948, 1103; *Sanderson v. Herman,* 108 Wis. 662, 666–668, 84 N. W. 890, 85 N. W. 141; *Friedrich v. Milwaukee,* 114 Wis. 304, 90 N. W. 174; *S. C.* 118 Wis. 254, 95 N. W. 126. This seems to be conceded by counsel.

3. Error is assigned because the court, prior to the entry of judgment in either case, refused to grant a stay of proceedings and order a reassessment, as prescribed by sec. 1210*e*,

Stats. 1898, as amended by ch. 354, Laws of 1903. Whether such ruling was right is the important question in this case. Prior to that amendment that section provided that:

"If in any action to set aside any special assessment against property for any of the purposes mentioned in section 1210*d* [which includes street improvement], or to set aside any special assessment certificate . . . the court determine that such assessment is invalid by reason of a defective assessment of benefits and damages, it shall stay all proceedings in such action until a new assessment thereof be had in the manner hereinafter mentioned; . . . When the amount to be assessed against the plaintiff's property has been finally determined by an assessment of benefits and damages which the court shall hold to be valid, or when an appeal is taken, the court shall make an order requiring the plaintiff to pay into court, within a time to be fixed by such order, for the benefit of the parties entitled thereto, the amount which, based upon such valid new assessment, he ought justly to pay, or which should be justly assessed against the property in question; upon compliance with said order judgment shall be entered for the plaintiff with costs. If the plaintiff fails to comply with such order the action shall be dismissed with costs."

In obedience to that section it was held by this court three years prior to that amendment, in effect, that the remedy by appeal to the circuit court for such illegal assessment, provided by the charter of *Milwaukee,* was not exclusive, but that the aggrieved party might resort to a court of equity. *Kersten v. Milwaukee,* 106 Wis. 200, 206, 81 N. W. 948, 950, 1103. In that case it was also held that "where, in an action to set aside a special assessment for street improvements, the assessment is held invalid by reason of defects in the assessment of benefits and damages, it is the duty of the court, under sec. 1210*e,* Stats. 1898, to stay proceedings, so far as relates to the assessment of benefits and damages, order a reassessment, and make payment of the amount finally determined a condition of judgment." That was followed by *Sanderson v. Herman,* 108 Wis. 662, 666–668, 84 N. W. 890, 85

N. W. 141, decided two years prior to the amendment mentioned. Each of those cases was in equity to set aside a special assessment against property for a purpose mentioned in sec. 1210*d*, as mentioned in sec. 1210*e*, Stats. 1898. In each of those cases the right to a stay of proceedings and a reassessment was expressly sanctioned. In *Friedrich v. Milwaukee*, 114 Wis. 304, 90 N. W. 174, a complaint for damages on account of such illegal assessment was sustained, and no reassessment was ordered, because it was on demurrer and, as there stated, the cause of action alleged or sought to be alleged was not in equity to enforce a reassessment under the statutes (secs. 1210*d*–1210*f*, Stats. 1898), as in the two cases just mentioned. That decision in *Friedrich v. Milwaukee* was made by this court more than a year prior to the enactment of ch. 354, Laws of 1903. Subsequently that case was tried on the merits, and a judgment for damages in favor of the plaintiff was affirmed by this court. *Friedrich v. Milwaukee*, 118 Wis. 254, 258, 95 N. W. 126. That case was argued in this court two weeks prior to that enactment, and decided four days after that act went into effect. Obviously the decisions mentioned led to the enactment. One of the purposes of that act was to make the statutes apply to actions at law as well as suits in equity. And so it prefixes to sec. 1210*e* a provision which declares that:

"If in any action at law for the recovery of damages arising from a failure to make a proper assessment of benefits and damages, as provided by law, or failure to observe any provisions of law, or because of any act or defect in any proceeding in which benefits and damages are assessed," etc. Ch. 354, Laws of 1903.

That is followed by what is quoted from sec. 1210*e*, above, and also other provisions of that section. By sec. 1210*e*, as thus amended, a complete scheme for reassessment was provided in every case where the special assessment for street improvement was held to be invalid by reason of defects in the

assessment of benefits and damages—whether such invalidity be determined in an action at law or in equity. In other words, the right to a reassessment when such invalidity was determined in an action in equity, as held in *Kersten v. Milwaukee* and *Sanderson v. Herman, supra,* was, by the statute, as amended by ch. 354, Laws of 1903, also given when such invalidity is determined in an action at law.

4. It is claimed that the amendment was not retroactive, and hence did not apply to either of the cases at bar. That chapter went into effect more than six months prior to the commencement of the action at law, and nearly nine months prior to the commencement of the suit in equity. True, the assessments complained of were made prior to that enactment. But, as indicated, the act merely extended the remedy by reassessment which previously existed when such invalidity was determined in an action in equity to the cases in which such invalidity is determined in an action at law. It did not undertake to destroy or impair any substantial right. By its terms it applied "in any action at law" or in equity therein prescribed, and hence applied to the cases at bar.

5. But it is claimed that the damage to the plaintiff's lot by reason of the wrongful acts complained of gave to the plaintiff a right of action against the defendant, which, under the constitutions—state and federal—could not be divested or impaired by subsequent legislation. Secs. 9, 13, art. I, Const. Wis.; sec. 1, art. XIV, Const. U. S. Moreover, it is claimed that such right is not preserved by the statute in question, nor by the city charter, and that there is no provision for paying an award in the lotowner's favor in case of an appeal. Of course, the provisions of the charter of *Milwaukee* are to be considered in connection with the statutes mentioned. Neither the charter nor the statute attempts to deprive the lotowner of any damages in excess of the benefits, and hence they are not objectionable on that ground. *Norwood v. Baker,* 172 U. S. 269, 19 Sup. Ct. 187; *Lathrop v. Racine,* 119 Wis. 461, 475,

97 N. W. 192. Thus in the chapter of the charter on "Taking Property for Streets and Other Purposes" it is provided that:

"If the total amount of damages as assessed, exceeds the total amount of benefits as assessed, the excess of such damages shall be chargeable to and paid out of the *general city fund and the ward funds* of the wards in which the lands proposed to be taken are situated, in equal proportions." Sec. 6, ch. VI.

And again that chapter provides that:

"If the damages to any person be greater than the benefits received, or if the benefits be greater than the damages; in either case the board shall strike a balance, and carry the difference forward to another column so that the assessment will show what amount is to be *received or paid by such owner* or owners respectively, and *the difference only* shall in any case be collected *of them or payable to them.*" Sec. 8, ch. VI.

It also gives to the lotowner the right to appeal from such assessment to the circuit court, upon giving the notice and bond prescribed, and provides that if upon the trial in the circuit court

"the benefits assessed by the said board of public works shall be diminished, or the damages so assessed shall be increased, then and in either case the appellant shall recover costs on such appeal, otherwise the city shall recover costs. When the jury shall, by their verdict, award damages to the owner of any lot or part of a lot, and judgment shall have been rendered upon such verdict, the said city shall pay the amount of such judgment, and the costs, if any, recovered therewith. . . . And in case the appellant shall succeed, the difference between the amount assessed and the amount finally adjudged shall be chargeable to and paid out of the proper ward fund." Sec. 14, ch. VI.

So in the chapter of the charter on "City Improvements and Special Assessments" it is provided that "the grading . . . shall be chargeable to and payable by the lots fronting or abutting upon such streets . . . to the amount which such

grading . . . shall be adjudged by said board to benefit such lots." Sec. 2, ch. VII. The same section provides for paying certain expenses out of the ward fund. That chapter then prescribes the proceedings essential in "grading or improving streets." Sec. 6, ch. VII. It then provides for the "assessment of benefits for street work" on lots abutting thereon, "taking into consideration in each case any injury which in the opinion of the board may result to each lot or piece of land from such improvement; and in case the benefits, in their opinion, amount to less than the cost of the improvement, the balance shall be paid out of the ward fund of the ward or wards in which such improvement is made." Sec. 7, ch. VII. The next section provides for compensation to lot-owners for change of grade, and assessments therefor, and provides that "the excess of the said damages, costs and charges over the benefits assessed, as provided in the preceding section, shall be paid out of the ward funds of the ward or wards in which such improvement and alteration of grade shall be made." Sec. 8, ch. VII. That chapter then gives to the lotowner the right to appeal from such assessments to the circuit court upon giving the notice and bond prescribed; and then declares that:

"Such appeal shall not affect the rights of the contractor, or the proceedings in reference to his contract, but the certificate against the lot or parcel of land in question shall be given as if no appeal had been taken; and in case the appellant shall succeed, the difference between the amount charged in the certificate and the amount of the benefit finally adjudged, shall be paid by the city out of the proper ward fund, to the appellant, but not until he shall have done the work in question, or have paid the certificate issued for doing the same. The amount assessed by the board of public works, or finally adjudged on appeal, for damages, costs and charges arising from an alteration of the grade, *in excess* of the amount charged against property deemed benefited, shall be paid by the city out of the proper ward fund, to the person or persons thereto entitled," as therein provided. Sec. 11, ch. VII.

It is true that the charter provides that such appeal shall be the lotowner's only remedy for such damages. Sec. 15, ch. VI; sec. 12, ch. VII. But such provisions in the charter could not prevent the legislature from providing otherwise, as they did by sec. 1210*e*, Stats. 1898, as held by this court in the cases cited. *Kersten v. Milwaukee,* 106 Wis. 200, 81 N. W. 948, 1103; *Sanderson v. Herman,* 108 Wis. 662, 84 N. W. 890, 85 N. W. 141. In those cases it was held that the right to appeal given to the lotowner by the city charter was not exclusive, but that the person aggrieved might resort to a court of equity; and now, under ch. 354, Laws of 1903, he may resort to reassessment in a court of law. As already indicated, the statute declared before and since that amendment, in effect, that when

"an assessment of benefits and damages" has been held to be valid by the court, "or when an appeal is taken, the court shall make an order, requiring the plaintiff to pay into court, . . . *for the benefit of the parties entitled thereto,* the amount which, based upon such valid new assessment, he ought to justly pay, or which should be justly assessed against the property in question; upon compliance with said order judgment shall be entered for the plaintiff with costs. If the plaintiff fails to comply with such order the action shall be dismissed with costs."

It will be observed that the lotowner is only required to pay into court the amount he ought justly to pay according to such new and valid assessment, and that such payment is to be for the benefit of such parties as the court may adjudge to be entitled thereto. Of course, the rights of the contractor are to be considered, the same as though the lotowner had appealed to the circuit court from the assessment under sec. 11, ch. VII of the charter, mentioned above. So the money so paid into court is to be finally disposed of by the court, sitting as a court of equity, to the parties entitled thereto. The amount finally adjudged for damages, costs, and charges, "*in excess* of the amount charged against property deemed bene-

fited, shall be paid by the city out of the proper ward fund, to the person or persons thereto entitled," the same as though the owner had appealed to the circuit court, under the section of the charter last cited. Where a municipality is thus made liable to the lotowner for any damages sustained in excess of such benefits, the taxable property of such municipality constitutes a pledge or fund to which the owner may resort for payment in the manner prescribed by the statute. *Norton v. Peck,* 3 Wis. 714, 724; *Brock v. Hishen,* 40 Wis. 674; *Smeaton v. Martin,* 57 Wis. 364, 15 N. W. 403, and cases there cited; *Smith v. Gould,* 59 Wis. 641, 18 N. W. 457; *State v. Hogue,* 71 Wis. 390, 36 N. W. 860; *State ex rel. Burbank v. Superior,* 81 Wis. 654, 51 N. W. 1014. We perceive no invasion of the plaintiff's supposed constitutional right to damages by reason of such proposed reassessment. We must hold that the court improperly refused to stay proceedings and direct a reassessment as prescribed by sec. 1210*e,* as amended by ch. 354, Laws of 1903.

By the Court.—Both of the judgments of the superior court of Milwaukee county are reversed, and the causes are both remanded for further proceedings as indicated in this opinion.

The appellants moved for a rehearing. The motion was denied February 21, 1905, and the following opinion was filed:

CASSODAY, C. J. The fifth subdivision of the opinion filed in this case is not as explicit as it should have been. It seems to have misled counsel on both sides. This may be the result of a failure to appreciate that what was said in that portion of the opinion was by way of answering the contention that the plaintiff's right to damages was not preserved by sec. 1210*e,* Stats. 1898, as amended by ch. 354, Laws of 1903, "nor by the city charter," the "provisions" of which were "to be considered in connection with the statutes mentioned."

The several provisions of the charter quoted in the opinion were merely to indicate the general scope and statutory policy as to benefits and damages to the abutting lotowner when the city had proceeded regularly as prescribed by the statutes. The statement in the opinion that "neither the charter nor the statute attempts to deprive the lotowner of any damages in excess of the benefits" does not mean that it confers any right to such damages which did not exist at the time of the enactment of ch. 354, Laws of 1903. Certainly none are given either by statute or common law in case of original grading done lawfully and regularly. In this case the city did not proceed regularly, as prescribed by law, and hence for that reason became liable for the consequential damages proximately caused by the improvement. *Drummond v. Eau Claire,* 85 Wis. 556, 55 N. W. 1028; *Jorgenson v. Superior,* 111 Wis. 561, 87 N. W. 565; *Friedrich v. Milwaukee,* 114 Wis. 304, 90 N. W. 174; *Bunker v. Hudson,* 122 Wis. 43, 99 N. W. 452, and cases there cited; *Damkoehler v. Milwaukee, ante,* p. 144, 101 N. W. 707. The plaintiff's right to such damages could not be taken away by the subsequent amendment of sec. 1210*e,* Stats. 1898, by ch. 354, Laws of 1903, although it could provide for a reassessment of the amount of benefits secured to the lotowner, and which he ought to pay to the city. If, when so ascertained, they are less than the legal damages to which the plaintiff is entitled, the ward funds of the ward in which the improvement is made are clearly liable for the excess. Sec. 7, ch. VII, Milwaukee Charter. Counsel contends that there are no benefits in this case, but that is a question to be determined in such reassessment proceedings prescribed in sec. 1210*e,* Stats. 1898, as amended by ch. 354, Laws of 1903. Of course, the mandate is to be construed as referring to this opinion as well as to the original.

KERWIN, J., took no part in the decision of this case.

CANTERBURY, Respondent, vs. NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Appellant.

November 22, 1904—February 21, 1905.

Life insurance: Assignability of wife's beneficiary right.

1. Where a husband procured a policy of insurance on his own life for the benefit of his wife, payable on his death to her "or her executors, administrators, or assigns," the statutes of this state as they existed prior to the enactment of sec. 1, ch. 376, Laws of 1891,—substantially as in sec. 2347, R. S. 1878,—did not preclude the husband and wife together from assigning the policy with the consent of the insurance company.
2. Sec. 1, ch. 376, Laws of 1891 (providing that every such policy "shall be the sole and separate property" of the wife and shall inure to her separate use and benefit and that of her children, and, in case of her surviving the term of the policy, the amount of the insurance shall be payable to her for her own use and benefit, "free from the control, disposition, or claims of her husband" or his representatives or creditors), assuming it to be applicable, as therein provided, to policies issued before its enactment, did not impair the assignability of such policies. A declaration in *Ellison v. Straw*, 116 Wis. 207, to the effect that, under said act (embodied in sec. 2347, Stats. 1898), a married woman had no right to assign her interest in a policy of insurance on the life of another, is withdrawn.

   MARSHALL and SIEBECKER, JJ., concur as to the assignability of policies issued before the act of 1891 and therefore governed by the prior law, but are of the opinion that policies for the benefit of married women, issued subsequent to and governed by the act of 1891, are not assignable.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Reversed.*

It appears that the plaintiff's husband, James B. Canterbury, died February 14, 1901. This action is brought by the widow upon three policies of insurance, each constituting the basis of a separate cause of action. The first cause of action is based upon policy No. 79,941, dated December 5, 1874, for $2,000; the second is based upon policy No. 88,933, dated June 16, 1876, for $2,000; and the third is based upon pol-

icy No. 97,243, dated September 24, 1878, for $3,000; and each cause of action alleges, in effect, that the deceased procured from the defendant the policy of insurance upon his life "for the benefit of *Catherine A. Canterbury,* his wife," in the amount stated therein, for the term of his natural life, and thereby the defendant promised and agreed "to pay the said sum assured, at its office, to the said beneficiary or her executors, administrators, *or assigns,* in sixty days after due notice and proof of death of the said person whose life" was thereby assured; that the defendant waived proofs of death and each and every condition precedent to the bringing of this action by denying that the plaintiff had at the time of her husband's death, or has since had, any insurable interest whatsoever under and by virtue of said policy, and by refusing to pay the amount of the policy, or any part thereof, for the reason of an alleged assignment of the same previous to the death of James B. Canterbury; and claims that there is due on each of such policies the amount therein stated, with interest from April 15, 1901, and prays judgment for $7,000, with interest from April 15, 1901.

The amended answer to the first cause of action, based upon policy No. 79,941, consists of admissions and denials, and then, under the seventh subdivision, consists of: (1) Counter allegations to the effect that July 31, 1896, said James B. Canterbury and said *Catherine A. Canterbury,* for a valuable consideration to them duly paid, duly sold, assigned, transferred, and set over unto the National Bank of La Crosse all their right, title, and interest in and to said policy No. 79,941, and delivered said policy to said bank; that such assignment was in writing and in duplicate, and such duplicate was, on or about said date, sent to the home office of this defendant, and has ever since been and is now in its possession; that said assignment continued in full force and effect down to and at the time said policy was paid by this defendant, as hereinafter set forth; and that at the time said assign-

ment of said policy was so made said James B. Canterbury was indebted to said bank in an amount in excess of the aggregate of said policy No. 79,941, and another policy issued by this defendant, No. 9,256, for $1,000, upon the life of said James B. Canterbury, payable to his executors, administrators, or assigns, and also duly assigned to said bank, and that such indebtedness continued down to and at the time of the death of said James B. Canterbury and at the time of the payment of said policy as hereinafter set forth, and that at all such times said bank had an insurable interest in the life of said James B. Canterbury in excess of the aggregate of said policies. (2) That February 26, 1901, said bank furnished to this defendant due notice and due proofs of the death of said James B. Canterbury, and that therein and thereby said bank expressly claimed, as assignee of such policy, the entire proceeds thereof; and that said bank, at or about said date, also furnished to this defendant due proof of the aforesaid insurable interest of said bank in the life of said James B. Canterbury. (3) That March 16, 1901 (no other claim having been made by any one to said policy No. 79,941 or to the proceeds thereof), this defendant duly paid to said bank, as such assignee, under the proofs so furnished by it as aforesaid, the sum of $2,000 in full of all claims on said policy, and received from said bank its receipt in full therefor, together with the surrender and delivery of said policy to this defendant. (4) That said *Catherine A. Canterbury* never had any child or children. (5) That the plaintiff ought not to question said assignment, or the payment so made by this defendant to said bank, because said plaintiff at all times aforesaid had full knowledge of all the facts aforesaid, including the assignment of said policy, the indebtedness of said James B. Canterbury at that time, and that said policies remained in the possession of said bank, and shortly after the payment of said money to said bank that said bank had furnished to this defendant proofs of death and of its insurable interest, and

that this defendant had paid to said bank said sum of $2,000 and accepted from it the surrender and delivery of said policy; and because said plaintiff never at any time prior to January 27, 1904, made any question or objection thereto, or in any way in respect thereof, but by her silence acquiesced therein and consented thereto; and that prior to January 27, 1904, said plaintiff never in any way or at any time questioned said assignment of said policy, or the claim of said bank, or the payment by this defendant to said bank, as hereinbefore set forth, and prior to said date never made any demand upon this defendant in any way relating to said policy, or gave to this defendant any notice of any claim whatever by her in respect thereof.

The amended answer to the second cause of action, based upon policy No. 88,933, consists of admissions and denials, and under the seventh subdivision thereof consists of: (1) Counter allegations to the effect that October 1, 1892, said James B. Canterbury and said *Catherine A. Canterbury,* for a valuable consideration to them duly paid, duly sold, assigned, transferred, and set over unto the State Bank of La Crosse all their right, title, and interest in and to said policy No. 88,933, and delivered the said policy to said bank; that such assignment was in writing and in duplicate, and such duplicate was, on or about said date, sent to the home office of this defendant, and has ever since been and is now in its possession; and that said assignment continued in full force and effect down to and at the time said policy was paid by this defendant as hereinafter set forth; and that at the time said assignment of said policy was so made as aforesaid said James B. Canterbury was indebted to said bank in an amount in excess of the aggregate of said policy No. 88,933, and another policy issued by this company, No. 97,243, for $3,000, upon the life of said James B. Canterbury, and also duly assigned to said bank; and that such indebtedness continued down to and at the time of the death of said James B. Canter-

bury and at the time of the payment of said policy as hereinafter set forth; and that at all such times said bank had an insurable interest in the life of said James B. Canterbury in excess of the aggregate of said policies. The balance of such counter allegations, 2, 3, 5, and 6, in answer to that cause of action, are substantially the same as 2, 3, 4, and 5 in answer to the first cause of action with this addition: (4) That said State Bank of La Crosse, at or about the time of said assignment of said policy to it and at various times thereafter, in order to protect and to continue said policy in force, was obliged to and did promptly pay certain of the premiums upon said policy as the same became due according to the terms thereof, but the defendant is unable to state when and in what amounts said premiums were so paid by said bank, except as aforesaid.

The amended answer to the third cause of action, based upon policy No. 97,243, consists of admissions and denials, and under the seventh subdivision thereof consists of: (1) Counter allegations to the effect that October 1, 1892, said James B. Canterbury and said *Catherine A. Canterbury,* for a valuable consideration to them duly paid, duly sold, assigned, transferred, and set over unto the State Bank of La Crosse all their right, title, and interest in and to said policy, and delivered the said policy to said bank; that such assignment was in writing and in duplicate, and such duplicate was, on or about said date, sent to the home office of this defendant, and has ever since been and is now in its possession; and that said assignment continued in full force and effect down to and at the time said policy was paid by this defendant as hereinafter set forth; and that at the time said assignment of said policy was so made as aforesaid said James B. Canterbury was indebted to said bank in an amount in excess of the aggregate of said policy No. 97,243 and another policy issued by this company, No. 88,933, for $2,000, upon the life of said James B. Canterbury, and also duly assigned to said

bank; and that such indebtedness continued down to and at the time of the death of said James B. Canterbury, and at the time of the payment of said policy as hereinafter set forth; and that at all such times said bank had an insurable interest in the life of said James B. Canterbury in excess of the aggregate of said policies. The balance of such counter allegations, 2, 3, 5, and 6, in answer to that cause of action, are substantially the same as 2, 3, 4, and 5 in answer to the first cause of action, above mentioned, with this addition: (4) That said State Bank of La Crosse, at or about the time of such assignment of said policy to it and at various times thereafter, in order to protect and continue said policy in force, was obliged to and did promptly pay certain of the premiums upon said policy as the same became due according to the terms thereof, but this defendant is unable to state when and in what amounts said premiums were so paid by said bank, except as aforesaid.

The defendant, further answering said complaint and each and all of the several causes of action therein, submits to the court that at all times mentioned in said complaint this defendant and said plaintiff each was, and still is, and the said James B. Canterbury, down to the said time of his death, was, a lawful citizen of the United States and of the state of Wisconsin, and that therefore said defendant and said plaintiff and said James B. Canterbury, and each of them, as such person and citizen under the constitution of the United States and its several amendments, as properly construed, at all times in said complaint mentioned had and enjoyed all the rights and privileges of free persons, and as such citizens, including the right to transfer, assign, and convey any and all their respective right, title, and interest in and to said policies, and each thereof, any statute of the state of Wisconsin or judicial decision of the courts of Wisconsin to the contrary notwithstanding. And this defendant especially sets forth and claims that any denial by any such statute

or judicial decision of the right of the said James B. Canterbury or of the plaintiff, or of both of them, to make the assignment or assignments aforesaid of said policies, or any or either thereof, because of any of the terms of said policies, or either or any thereof, impairs the obligations of said contracts respectively, and brings in question the prohibition contained in sec. 10 of art. I of the constitution of the United States respecting the same; and also abridges the privileges and immunities of said plaintiff and said James B. Canterbury and this defendant, and each thereof, as such citizens as aforesaid, and deprives them and each of them of their and each of their liberty and property without due process of law, and brings in question the prohibition contained in sec. 1 of art. XIV of the amendments to the constitution of the United States in respect thereto as properly construed.

The plaintiff demurred to the separate defense and answer of the defendant to the plaintiff's first, second, and third causes of action, respectively, on the ground that the same on the face thereof does not state facts sufficient to constitute a defense; and the plaintiff also demurred to the separate defense contained in the answer to the whole complaint and to each and all of the several alleged causes of action therein, on the ground that the same on the face thereof does not state facts sufficient to constitute a defense.

The trial court sustained each of said demurrers, and the defendant having in open court elected not to amend its answer, but to stand thereon, it was thereupon ordered that judgment be entered in favor of the plaintiff and against the defendant for $6,062 damages, being the face of said three policies mentioned in the complaint, with interest from January 27, 1904, less premiums paid by the assignees, with interest thereon, together with costs. From the judgment entered thereon accordingly the defendant appeals.

For the appellant there were briefs by *Charles E. Dyer*, attorney, and *F. C. Winkler* and *W. D. Van Dyke*, of coun-

sel, and a separate supplemental brief by *W. D. Van Dyke*, of counsel, and the cause was argued orally by *Mr. Winkler* and *Mr. Van Dyke*.

For the respondent there was a brief by *Winter & Esch*, and oral argument by *Frank Winter*

CASSODAY, C. J. The facts in this case are undisputed. The plaintiff's husband, James B. Canterbury, procured from the defendant three policies of insurance on his own life—one for $2,000, dated December 5, 1874; another for $2,000, dated June 16, 1876; and another for $3,000, dated September 24, 1878—and it was stated in each of said policies, in effect, that it was "for the benefit" of "his wife," the plaintiff in this action, for the amount stated therein, for the term of his natural life, and this defendant therein promised and agreed "to pay the said sum assured, at its office, to the said beneficiary, or her executors, administrators, *or assigns*, in sixty days after due notice and proof of death of the said person whose life" was thereby assured. As indicated in the foregoing statement, the said James B. and *Catherine A. Canterbury*, on October 1, 1892, for a valuable consideration, sold, assigned, transferred, and set over unto the State Bank of La Crosse all their right, title, and interest in and to both of said policies dated, respectively, June 16, 1876, and September 24, 1878, and delivered the same to the bank. Such assignment was in writing and in duplicate, and such duplicate was at the time sent to the defendant's home office, and has remained there ever since, and said bank thereupon and repeatedly thereafter paid the premiums upon said policies, respectively, as they became due, to protect its interest therein. On July 31, 1896, James B. and *Catherine A. Canterbury*, for a valuable consideration, sold, assigned, transferred, and set over unto the National Bank of La Crosse all their right, title, and interest in and to said policy of December 5, 1874, and delivered the same to that bank. Such as-

signment was in writing and in duplicate, and such duplicate was at the time sent to the defendant's home office, and has remained there ever since, and said bank thereupon and repeatedly thereafter paid the premiums on said last-mentioned policy as they became due, to protect its interest therein.

It is conceded that all three policies were in full force at the time of the death of James B. Canterbury, February 14, 1901; that February 26, 1901, the respective banks holding such policies by such assignments furnished to the defendant due notice and proofs of death of James B. Canterbury, and therein and thereby expressly claimed, as such assignees, the entire proceeds of the policy or policies so held by it; and at the same time furnished to the defendant due proof of such banks' insurable interest in the life of James B. Canterbury; that March 16, 1901, this defendant paid to such banks, respectively, as such assignees, under the proofs so furnished, the full amounts called for by the respective policies, and the defendant then received from each of such banks its receipt in full therefor, together with the surrender and delivery of such policies to this defendant. The plaintiff never objected to nor questioned the validity of either of such assignments or the claims of the respective banks thereunder, or such payments to the banks, respectively, until nearly three years after such payments were made. This action was not commenced until January 31, 1904.

The questions presented concern the validity of such assignments and the effect of the payments made by the defendant to the respective banks on account of the policies and assignments mentioned. The wording of such contracts of insurance is certainly very plain and unambiguous. The controversy is as to the construction of the statutes under which they were made, or which have since been enacted.

1. The first question naturally calling for consideration is as to the meaning and effect of the statutes under which these insurance contracts were made. The difficulty in con-

struing such statutes arises from the fact that there were numerous provisions enacted at different times, and not always consistent, having more or less bearing upon the questions involved. To reach an accurate conclusion, the precise question here presented should be kept in mind. Where, as here, a husband procures a policy of insurance on his own life for the benefit of his wife, payable on his death to her "or her executors, administrators, or assigns," did such statutes preclude, or attempt to preclude, the husband and wife together from assigning the policy with the consent of the company which issued the same? One branch of the legislation had for its object the emancipation of the wife and giving her the power and right to receive, hold, convey, and transfer property the same as though she were unmarried. Such statutes have existed in this state in one form or another for more than fifty years. Ch. 44, Laws of 1850; ch. 95, R. S. 1858; ch. 108, R. S. 1878; and ch. 108, Stats. 1898. It is enough to say here on that subject that such rights and powers of married women, during that period, have gradually been enlarged and broadened. There is no controversy here as to such general rights and powers of married women, and hence there is no necessity of citing any specific provisions of such statutes on that subject. We are here particularly concerned about insurance procured by a husband on his own life for the benefit of his wife. The first enactment in this state on that subject was ch. 158, Laws of 1851, entitled "An act in relation to insurance on lives and for the benefit of married women and other persons." Sec. 1 of that act declared:

"That any policy of insurance made by any insurance company on the life of any person, expressed to be for the benefit of a married woman, whether the same be effected by such married woman or by her husband or by any other person on her behalf, *shall inure to her sole and separate use and benefit and that of her children*, if any, independently of her hus-

band and of his creditors and representatives, and also independently of any other person effecting the same in her behalf, his creditors and representatives."

That is copied almost literally from ch. 82 of the Acts of Massachusetts of 1844, having the same title; the only difference being in the use of the words "such married woman," instead of the word "herself," and inserting the words "sole and" between the words "her" and "separate use." That was followed by a clause not taken from the Massachusetts statute, to the effect that, "in case of the death of the husband" so insured, "such policy and the benefit thereof" should "belong to such married woman," and should "be for her sole use and behoof and that of her children." That statute was continued in force by sec. 5, ch. 95, R. S. 1858, and sec. 5, ch. 95, Tay. Stats. 1871. Ch. 182, Laws of 1862, was an independent act without any repealing clause, and was entitled "An act to secure to married women and others the benefit of insurance on lives," and the first section declared, among other things, that:

"It shall be lawful for any married woman to cause to be insured for her sole use, the life of her husband, her son, or any other person, for any definite period or for the time of the natural life of such husband, son or other persons [person]; and in case of her insuring such husband, son or other person, the sum or net amount of the insurance becoming due and payable by the terms of the insurance shall be payable to and for the sole use of such married woman, free and exempt from the claims of the representatives of such husband, son or other person, or of their or any of their creditors, respectively."

The balance of the act has no bearing upon the question here being considered. The object of the act was to authorize a married woman to procure insurance on "the life of her husband, her son, or any other person," and to exempt the same from the claims of creditors of such husband, son, or other person. That act was patterned after ch. 80, Laws of New

York of 1840, but which only authorized a married woman "to cause to be insured, for her sole use, the life of her husband, . . . and in case of her surviving her husband the sum or net amount of the insurance becoming due and payable by the terms of the insurance shall be payable to her, to and for her own use, free from the claims of the representatives of her husband, or of any of his creditors." The portions of that act referred to were expressly repealed by sec. 28, ch. 59, Laws of 1870, entitled "An act to regulate the business of life insurance." Sec. 1 of that act declared that:

"It shall be lawful for any married woman, by herself and in her own name, or in the name of any third person, with his assent as her trustee, to cause to be insured for her sole use, the life of her husband, son or other person for any definite period or for the term of the natural life of such person."

That is quite similar to the first portion of sec. 1, ch. 182, Laws of 1862, above quoted, and the statute of New York mentioned. Then follows a clause authorizing "any person" procuring insurance upon the life of another

"to assign, transfer or cause the same to be made payable to any married woman, . . . whether the person effecting or procuring such insurance or making such assignment or transfer be the husband of such married woman or not, and such policy of insurance, when expressed to be for the benefit of, or assigned, transferred or made payable to, any married woman, *shall inure to her separate use and benefit and that of her children,* and in case of her surviving such period or term, the sum or net amount of the insurance becoming due and payable by the terms of the insurance shall be payable to her, to and for her own use and benefit, free from the claims of her husband, his representatives or creditors, and free from the claims of the person effecting, assigning or transferring such insurance, his representatives or creditors."

These provisions are quite similar to sec. 5, ch. 95, R. S. 1858, and Tay. Stats. 1871, taken in part as they were from the statutes of Massachusetts. The exemption features of the statutes have not been fully pointed out because there is no

right or claim of any creditor here involved. The question here to be determined is the assignability of the policies.

Such are the provisions of the statutes more or less applicable to the case at bar, and which were in force when the policies in question were issued. These policies were all issued prior to November 1, 1878, when the Revised Statutes of that year went into effect. That revision made no substantial change in the statutes in force during the time such policies were issued. On the contrary such revision "condensed" and simplified sec. 19, ch. 59, Laws of 1870, and secs. 5 and 6, ch. 95, R. S. 1858, and Tay. Stats. 1871. Revisers' Notes, sec. 2347, R. S. 1878. Leaving out nonessentials—so far as the present case is concerned—and the new section reads as follows:

"Any married woman may, in her own name, . . . cause to be insured, for her sole use, the life of her husband, son or other person; . . . and any person, whether her husband or not, effecting any insurance of the life of another, may cause the same to be made payable or assign the policy to a married woman; . . . and every such policy, when expressed to be for the benefit of, or assigned or made payable to any married woman, . . . *shall inure to her separate use and benefit and that of her children,* and in case of her surviving the period or term of such policy, the amount of the insurance shall be payable to her or her trustee for her own use and benefit, free from the claims of her husband and of the person effecting or assigning such insurance, and from the claims of their respective representatives and creditors. . . . The amount of any such insurance may be made payable, in case of the death of such married woman before the period at which it becomes due, to her children or to their guardian for their use, if under age, or to any other person, as shall be provided in the policy. . . . The provisions of this section shall apply to all insurance on lives effected before the passage of these statutes." Sec. 2347, R. S. 1878.

It is claimed that under the portion of our statute taken from New York and the prior decisions in that state the policies in question were not assignable. It will be observed that

the New York statute mentioned was enacted while married women in that state were under the common-law disability. It simply made it "lawful for any married woman, by herself and in her name, or in the name of any third person, with his assent, as her trustee, to cause to be insured, for her sole use, the life of her husband," etc. In the case at bar none of the policies were procured by the wife, but all were procured by the husband on his own life for her benefit. The act of 1862 and the act of 1870 made it lawful for such married woman to procure such insurance not only upon the life of her husband, as in the New York act, but also on the life of "her son or any other person;" and so the act of 1870 made it lawful for any person to procure insurance upon the life of any person, and "to assign, transfer or cause the same to be made payable to any married woman." Sec. 2347, R. S. 1878, is to the same effect. So the New York act only provided that such insurance, so procured by a married woman, should "be payable to her, to and for her *own use,* free from the claims of" her husband's representatives and creditors, "in case of her surviving her husband." The act of 1870 declared that such insurance, assigned or made payable to a married woman, whether effected by her husband or some other person, should "inure to her separate use and benefit and that of her children." The words quoted are taken from the Massachusetts act, and are found in ch. 158, Laws of 1851; sec. 5, ch. 95, R. S. 1858, and Tay. Stats. 1871; and sec. 2347, R. S. 1878. It is true that in the New York case relied upon the wife obtained a policy of insurance on the life of her husband under the act mentioned, and she survived her husband; and it was held by a divided court that such policy was not transferable so as to divest the interest of the wife or her children. *Eadie v. Slimmon,* 26 N. Y. 9, 15, 17. DENIO, C. J., concurring, there said that the act mentioned "was an enabling, and not a declaratory, provision;" in other words, and to the extent therein mentioned, it

removed the common-law disability of the wife. In a subsequent case in the same court it was said that:

"We are not called upon to vindicate the doctrine of *Eadie v. Slimmon.* The inference of a legislative intent to make a policy *procured by a wife* on the husband's life unassignable, deduced *by the court* in that case, has sometimes been thought to rest on a slender foundation; but the case has been repeatedly followed. [Citing cases.] The legislature, in conferring by subsequent acts a limited power of assignment, have recognized the policy attributed to the legislation of 1840." *Brummer v. Cohn,* 86 N. Y. 11, 17.

In a later case in that state, speaking of *Eadie v. Slimmon,* it was said that:

"In that case and in all the cases following it the policy was either procured by the husband upon his life, and payable to the wife, or taken out by the wife and payable to herself. [Citing cases.] Since the inference of a legislative intent to make nonassignable a policy of insurance upon the life of a husband for the use or benefit of a wife, issued prior to the passage of the act of 1879, rests *wholly upon judicial construction,* and not upon the express terms of the statute of 1840, it should not, at this late day, be further extended by construction." *Dannhauser v. Wallenstein,* 169 N. Y. 199, 211, 212, 62 N. E. 160.

In a still later case in the same court it was held that:

"Money due upon a matured insurance policy, written by an ordinary life insurance company upon the life of a husband, payable to his wife, is subject to levy under a warrant of attachment issued against the property of the wife in an action brought to recover a debt owing by her." *Amberg v. Manhattan L. Ins. Co.* 171 N. Y. 314, 316, 317, 63 N. E. 1111.

It was there said that:

"While we have held that such a policy cannot be seized by the creditors either of the husband or the wife before it has become due and payable, we have not held that it is exempt from the claims of her creditors after the contingent promise has ripened into an actual promise and the right of the bene-

ficiary has become absolute. . . . The reason for holding that the policy is practically exempt until it becomes due is that the wife could not assign it until it matured, because 'it would be against the spirit and policy of the statute to allow such a policy to be assigned by a wife during the lifetime of her husband,' or before the maturity of the policy."

In view of the differences pointed out between the New York act of 1840 and our own statute, and in view of the more recent utterances of the highest court of that state on the subject, the decision in *Eadie v. Slimmon,* 26 N. Y. 9, cannot be regarded as persuasive authority for holding that under our statutes the policies in question were not assignable.

There is no claim here that any court has ever decided that the statute of Massachusetts made such policies nonassignable. On the contrary, the courts of Massachusetts have declared them to be assignable. Thus, a husband procured two policies of insurance on his own life "for the use of his wife, Mary D., and his children alive at his decease," and subsequently he and his wife assigned to one S. "all their title and interest in the policies, and all advantages to be derived therefrom," and thereafter S., at their request, assigned and delivered the same to the plaintiff, who thereafter paid the annual premiums and assessments thereon; each of such assignments was made to secure the repayment of money borrowed by the husband; the wife died before the husband, and then he died, leaving their child surviving; and it was held that the plaintiff, as such assignee, could maintain an action at law against the company on the policies, which, in the language of the act, were "expressed to be for the benefit of a married woman." *Burroughs v. State M. L. A. Co.* 97 Mass. 359. See, also, *Norris v. Mass. M. L. Ins. Co.* 131 Mass. 294; *Troy v. Sargent,* 132 Mass. 408; *Boyden v. Mass. M. L. Ins. Co.* 153 Mass. 544, 546, 27 N. E. 669. In this last case the assignment by the wife and children to the husband was held valid. In *Newcomb v. Mut. L. Ins. Co.* 18 Fed. Cas.

No. 10,147 (p. 47), a husband procured insurance on his own life for his own benefit, and then assigned it to his wife, and she assigned it to the plaintiff as security for a loan to the husband, and the federal court of Massachusetts held that the assignment was valid; and it was there said, in effect, that under the statute of that state the husband and wife together could transfer the wife's separate property therein as security for his debts or for any other lawful consideration. So where, in that state, a husband, in the name of his wife, procured insurance upon his own life for the benefit of his wife "for her sole use, if living, and, if not living, to her children," and the wife died first, leaving children, who died before the husband, it was held, in effect, that such insurance passed to the estate of the children. *Millard v. Brayton,* 177 Mass. 533, 59 N. E. 436. To the same effect, *Swan v. Snow,* 11 Allen, 224. In the case at bar it is conceded that the plaintiff never had any children nor child.

Such is the import and effect of the statute of Massachusetts of 1844 which was adopted in this state almost literally in 1851, and, as indicated, was continued in substantially the same form at least down to the revision of 1878. Certainly, the words "expressed to be for the benefit of a married woman," and the words "shall inure to her separate use and benefit and that of her children," found in the Massachusetts act, are also, with the words "sole and" inserted before the word "separate," found in the Revised Statutes of 1858 and Taylor's Statutes of 1871. The phraseology is slightly changed in the act of 1870, but the substance is preserved, as follows:

"Such policy of insurance, when expressed to be for the benefit of, or assigned, transferred or made payable to any married woman, shall inure to her separate use and benefit, and that of her children."

The same provision with the word "transferred" dropped out and the words "or any such trustee" inserted was con-

tinued in the revision of 1878 and also in the revision of 1898 (sec. 2347).

The first case in this court having any bearing upon the question here presented is *Kerman v. Howard,* 23 Wis. 108. In that case the husband procured an insurance on his own life, payable to his wife, "Ellen Hill, or her legal representatives." The husband had no child by Ellen, but had two daughters by a former wife, and the plaintiff was the daughter of Ellen by a former husband. The husband and wife were both injured by an explosion, from which they both died; the wife a few hours prior to the husband. After the death of the wife, the husband, without knowing that she was dead, made his will, giving the insurance to the three children "in equal parts," provided that his wife did not live, but that, if she did live, then it was to go to her. This court affirmed the judgment of the trial court disposing of the insurance according to the will, and held that:

"Where a husband survives his wife, having previously procured a policy of insurance on his own life for her benefit, and himself paid the premiums thereon, he may dispose of it by will or otherwise."

In that case this court commented at some length upon the case of *Eadie v. Slimmon,* 26 N. Y. 9, and concluded by saying that it could not "be regarded as controlling authority."

In *Archibald v. Mut. L. Ins. Co.* 38 Wis. 542, 545, 546, the husband procured from the defendant an insurance on his life of $3,000, payable to his wife. The husband died, and thereupon the wife commenced the action against the company. The company defended on the ground that the plaintiff was not the owner of the policy; that a short time before the husband's death he and his wife had, by an instrument in writing, assigned the policy to the persons therein named, to save them harmless from any indorsement and liabilities incurred by them for the assured; and it was said in the opinion, and this court held, that the husband and wife owned the

whole interest in the policy, and, having joined in making the assignment, the same was valid; that "there is nothing in our law which prohibits a married woman from making such an assignment;" and that "a life policy is on the same footing in these respects as other choses in action which are assignable in equity." That case has never been questioned by this court. On the contrary, it has frequently been cited with approval. *Ballou v. Gile,* 50 Wis. 614, 619, 7 N. W. 561; *Bursinger v. Bank of Watertown,* 67 Wis. 75, 81, 82, 30 N. W. 290; *Estate of Breitung,* 78 Wis. 33, 35, 46 N. W. 891, 47 N. W. 17. The case of *Archibald v. Mut. L. Ins. Co.* 38 Wis. 542, has also been repeatedly recognized as a sound adjudication in other jurisdictions. *Metropolitan L. Ins. Co. v. O'Brien,* 92 Mich. 584, 589, 52 N. W. 1012; *Amick v. Butler,* 111 Ind. 578, 582, 583, 12 N. E. 518, 520; *Davis v. Brown,* 159 Ind. 644, 647, 65 N. E. 908; *Binkley v. Jarvis,* 102 Ill. App. 59, 64; *Newcomb v. Mut. L. Ins. Co.* 18 Fed. Cas. No. 10,147 (p. 47). In this last case, United States Circuit Judge LOWELL cited the *Archibald Case,* among others, to the proposition that:

"The courts of all the states which have passed upon this question, under statutes more or less like ours, excepting the court of appeals of New York, have held that the married woman has the full domain over the policy, and may sell, assign, or pledge it like her other separate property."

It is there further said that "the decisions in *Eadie v. Slimmon,* 26 N. Y. 9, and *Barry v. Equitable L. A. Soc.* 59 N. Y. 587, are placed upon reasoning which does not apply to our statute." So, in an opinion by Mr. Justice FIELD, speaking for the supreme court of the United States, the *Archibald Case* is cited to the general proposition that:

"A policy of life insurance without restrictive words is assignable by the assured for a valuable consideration, equally with any other chose in action, where the assignment is not made to cover a mere speculative risk and thus evade the law

against wager policies; and payment thereof may be enforced for the benefit of the assignee, and, under the system of procedure in many states, in his name." *New York M. L. Ins. Co. v. Armstrong,* 117 U. S. 591, 597, 598, 6 Sup. Ct. 877.

Such was the law at the time the policies in question were issued, as declared by this court in the *Archibald Case.* True, one of those policies had been issued before that decision was announced. But that decision was no new announcement or departure from any established rule of law. On the contrary, the opinion declares the decision to be in accordance with "the settled law of this state." As already indicated, prior to that decision, and prior to any of the policies in question being issued, this court had expressly repudiated the decision of *Eadie v. Slimmon,* 26 N. Y. 9, holding "that a policy of insurance on the life of the husband for the benefit of the wife and children" was not transferable, "so as to divest the interest of the wife," and held that the husband had power to transfer such policy by will, even after the death of his wife, who had left a daughter her surviving. *Kerman v. Howard,* 23 Wis. 108. That decision carried the doctrine of assignability of such policies much beyond the decision in the *Archibald Case,* which, as indicated, merely held that the husband and wife together "owned the whole interest in the policy," and hence could transfer the same by joining in an assignment thereof. So the decision in *Kerman v. Howard* went beyond the decisions in the Massachusetts cases cited, for the same reason. But the decision in *Kerman v. Howard* has never been overruled by this court, and has frequently been followed or cited with approval, with an occasional dissent from the writer. *Foster v. Gile,* 50 Wis. 603, 7 N. W. 555, 8 N. W. 217; *Ballou v. Gile,* 50 Wis. 614, 7 N. W. 561; *Bursinger v. Bank of Watertown,* 67 Wis. 75, 81, 30 N. W. 290; *Given v. Wis. O. F. M. L. Ins. Co.* 71 Wis. 547, 552, 37 N. W. 817; *Estate of Breitung,* 78 Wis. 33, 35, 46 N. W. 891, 47 N. W. 17; *Strike v. Wis. O. F. M. L. Ins. Co.* 95

Wis. 583, 587, 70 N. W. 819; *Berg v. Damkoehler,* 112 Wis. 587, 590, 88 N. W. 606. The general purpose of the court has been to steadily adhere to the decision in *Kerman v. Howard* until the same should be changed by statute. It follows from what has been said that the policies in question were assignable at the times they were respectively issued.

2. The question recurs whether such assignability was destroyed or impaired by subsequent legislation. It has already been shown that the statutes on the subject in force at the times of issuing such policies were substantially the same as are found in the Revised Statutes of 1878 (sec. 2347). That section was amended in 1889 by striking the word "of" out from the words "effecting any insurance *of* the life of another," and inserting in lieu thereof the words "on his own life or on." Sec. 1, ch. 271, Laws of 1889. This broadened the scope of the language, but did not impair, nor attempt to impair, the assignability of the policy. That section was again amended in 1891 by inserting the words included in parentheses contained in the following portion of the section:

"Every such policy when expressed to be for the benefit of or assigned or made payable to any married woman or any such trustee, (shall be the sole and separate property of such married woman, and) shall inure to her separate use and benefit and that of her children, and in case of her surviving the period or term of such policy, the amount of the insurance shall be payable to her or her trustee for her own use and benefit, free from the (control, disposition or) claims of her husband and of the person effecting or assigning such insurance, and from the claims of their respective representatives and creditors." Sec. 1, ch. 376, Laws of 1891.

Undoubtedly, as indicated in the opinion of my brother MARSHALL, in *Ellison v. Straw,* 116 Wis. 207, 92 N. W. 1094, the purpose of that amendment was to radically change the judicial rule announced by this court in *Clark v. Durand,* 12 Wis. 223, and *Kerman v. Howard,* 23 Wis. 108, and other cases following those decisions, to the effect "that the mere

beneficiary named in a policy of insurance had no rights whatever which the assured was bound to respect." That amendment expressly enlarged the rights of the wife by declaring that every such policy "shall be the sole and separate property of such married woman," free from the "control, disposition or" claims of her husband or any other person. It thereby expressly took from the husband or other person procuring such insurance for her benefit all right of control over and disposition of such policy, as previously held by this court. But that amendment, properly construed, did not impair nor attempt to impair, much less destroy, the assignability of such insurance contract. The fact that it declares that such policy "shall be the sole and separate property of such married woman" does not imply that she has no power to assign the same with the consent of the company from which it issued. Nor can it be properly claimed that such insurance contract is made nonassignable by reason of the words thus injected into the section by the amendment being followed by the words, "shall inure to her separate use and benefit and that of her children," since, as already shown, those words were taken from the statute of Massachusetts and have been in force in this state as a part of the statute in question ever since the act of 1851 mentioned. They were therefore in force when this court held such policies to be assignable in *Kerman v. Howard* and the *Archibald Case* and the other cases following those decisions. By a well-established rule of law, which in this state has long been statutory, the effect of an amendment to a section of the statutes otherwise continued is merely to leave the section so amended as it was before, with the added feature. Sec. 4985, Stats. 1898; *Madden v. Kinney,* 116 Wis. 561, 568, 93 N. W. 535; *Danforth v. Oshkosh,* 119 Wis. 262, 309, 97 N. W. 258. Ever since the act of 1870 the section of the statutes in question contained a clause which expressly declares that "the amount of any such insurance may be made payable, in case of the death

of such married woman before the period at which it becomes due, to her children or to their guardian for their use, if under age, or to any other person as shall be provided in the policy." Sec. 2347, Stats. 1898. The language of the act of 1870 was slightly different, but it was substantially the same as indicated above. That clause expressly authorized the assured, in case he survived such married woman, to provide in the policy to whom the same should be payable; and, in case he failed to do so, then it was to be payable to her children or their guardian. *Ellison v. Straw,* 116 Wis. 207, 214, 92 N. W. 1094. That clause expressly gave to such married woman at least a contingent interest in the policy during the life of the assured and while the same was not otherwise disposed of by him. In the case at bar the plaintiff survived her husband and never had any children nor child, so that clause of the section is not here applicable.

But, as already indicated, there was a clause in the act of 1870 to the effect that, in case such married woman named as beneficiary in such policy should survive the "period or term" therein expressed, "the sum or net amount of the insurance becoming due and payable by the terms of the insurance" should "be payable to her, to and for her own use and benefit, free from the claims of her husband, his representatives or creditors, and free from the claims of the person effecting, assigning or transferring such insurance, his representatives or creditors." Such was the language of the clause when the policies in question were issued. As indicated, the same was condensed and continued in sec. 2347, R. S. 1878, and, as amended, in the Statutes of 1898, wherein it is declared, in effect, that in case such married woman survived "the period or term of such policy, the amount of the insurance" should "be payable to her or her trustee for her own use and benefit," etc. The fact that such insurance was to be so paid to her or for her use and benefit, in case she so survived, but, in case she did not so survive, then to be paid "to her children, or to

their guardian, . . . or to any other person" who might be "provided" for "in the policy," is a pretty clear indication that the legislature only intended to prescribe where the insurance money should otherwise go in case the married woman did not so survive. In other words, in case she so survived, then the insurance money was to be paid "to her or her trustee for her own use and benefit," regardless of the question whether she had children or not. As held in Massachusetts, "if a policy of insurance is expressed to be for the benefit of the wife of the assured, her children have no interest in it during her lifetime." *Norris v. Mass. M. L. Ins. Co.* 131 Mass. 294; *Troy v. Sargent,* 132 Mass. 408.

Such were the provisions of the statutes applicable when this court held that, as the assured and his wife owned the whole interest in such policy, they could together transfer the same by assignment with the consent of the company. *Archibald v. Mut. L. Ins. Co.* 38 Wis. 542, 546. The assignments of the policies in question by the plaintiff and her husband were not made until after the amendment of 1891. That amendment in terms applied "to all insurance on lives effected before" its enactment. Assuming it to be applicable to the policies in question, yet it nowhere attempted to take away from such married woman any interest she had in any such policy. On the contrary, it purported to enlarge her right, title, and interest therein by expressly declaring that such policy should be her "sole and separate property," free from the "control" or "disposition" of her husband or other person procuring the same. The language employed indicates absolute ownership. That amendment placed a married woman, named as beneficiary in such life insurance policy, upon an equal footing with a single female or a man, as previously held in other jurisdictions. Thus, in an English case, where a man procured insurance on his own life in the name of his daughter, and retained the policy in his own possession, and paid all the premiums thereon, it was held to be a complete

gift to the daughter, and that upon the death of her father she was entitled to the insurance money. *Weston v. Richardson,* 47 L. T. Rep. 514. So it has been held by the supreme court of the United States to be a general rule that a life insurance policy, and the money to become due under it, belong, the moment it is issued, to the person named therein as beneficiary. *Central Bank v. Hume,* 128 U. S. 195, 9 Sup. Ct. 41. To the same effect: *Glanz v. Gloeckler,* 104 Ill. 573; *Wilburn v. Wilburn,* 83 Ind. 55; *Laudenschlager v. N. W. E. & L. Asso.* 36 Minn. 131, 30 N. W. 447; *Robinson v. Duvall,* 79 Ky. 83; *City Sav. Bank v. Whittle,* 63 N. H. 587, 3 Atl. 645. Such absolute ownership, with no disability, carried with it by necessary implication the constitutional right to assign and dispose of such policy. See *New York M. L. Ins. Co. v. Armstrong,* 117 U. S. 591, 6 Sup. Ct. 877, and other cases cited above; *Planters' Bank v. Sharp,* 6 How. 301; *Pearsall v. G. N. R. Co.* 161 U. S. 646, 663, 664, 16 Sup. Ct. 705; *People v. Otis,* 90 N. Y. 48. Thus it has been held by this court that stock in a private corporation is personal property, and that the owner thereof has the right to transfer the same in the manner prescribed by statute, notwithstanding a by-law of the corporation to the contrary. Such by-law was therein held to be void, as against public policy. *In re Klaus,* 67 Wis. 401, 404, 405, 29 N. W. 582; *Edgerton T. M. Co. v. Croft,* 69 Wis. 256, 259, 34 N. W. 143.

The bringing of this action was doubtless induced by what was recently said by this court in *Ellison v. Straw,* 116 Wis. 207, 92 N. W. 1094; and if we adhere to all that was said in that case, as distinguished from what was presented and necessarily decided, then it was justified. That case did not involve the voluntary assignment of any policy of insurance. Several of the statutes and decisions bearing upon that question were not there brought to our attention nor considered. The question there presented and decided was whether the interest of a married woman in an insurance policy on her

husband's life was, during his life, exempt from her debts. That question was new in Wisconsin, for, prior to 1891, her interest, being subject to transfer or destruction at the will of her husband, was of so uncertain value as not to attract attempts by creditors to reach it. With no opposing adjudications in this state on that question, we reached the conclusion and decided that the various provisions in our statutes indicated a purpose to provide for the widow and her children; and that such liability to her creditors was so inconsistent with such purpose that we were forced to believe that the legislature intended that her interest in such insurance policy, even though her sole and separate property, was nevertheless exempt from the reach of creditors. That question is not here involved, but we have no disposition or purpose to indicate that if it were we should hesitate to adhere to that decision. The case of *Ellison v. Straw,* however, went further, and declared that the same provisions of our statute indicated a purpose to prohibit the assignability of such a policy by a married woman. That view was largely based upon the assumed identity of our statute with that of New York, and upon *Eadie v. Slimmon* and like cases. If the question here presented were an original one, like that of the exemption, we might feel bound by the decision in *Ellison v. Straw.* But our attention is now called to the fact that our statute was mostly taken from Massachusetts, and that the doctrine of *Eadie v. Slimmon* had long before been repudiated by this court, and that the assignability of such policies had been repeatedly decided under statutes containing the same provisions as at present, except only the new words incorporated by the act of 1891. We cannot doubt that these decisions of our own court are of such age and character as to entitle them to full *recognition* under the rule *stare decisis.* They manifestly had become a rule of property on which the defendant relied in paying these policies. A stronger case to justify such reliance could not well be presented. After full consid-

eration, we do not feel justified in departing from the decisions referred to, and so we are constrained to withdraw the declaration in *Ellison v. Straw, supra,* to the effect that a married woman has no right to assign her interest in a policy of insurance on the life of another. We must hold that all right, title, and interest in the policies in question were transferred by the assignments mentioned to the respective banks, and that the same were paid and satisfied by this defendant long prior to the commencement of this action.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with direction to dismiss the action.

MARSHALL, J. (*dissenting in part*). I concur in the result reached but not in all the reasons assigned therefor. The policies were issued before the act of 1891 and are governed by the prior law, permitting the assured in such cases to deal with the policy regardless of the beneficiary. The legislature could not change existing contracts. That was not suggested in *Ellison v. Straw,* 116 Wis. 207, 214, 92 N. W. 1094. It is sufficient for this case, regardless of the beneficiary having joined with her husband in the assignments.

I regret that the decision is not rested on that which we all agree to, instead of covering, unnecessarily, a field where we are so divided that, in view of the addition to our number about to occur when the case was submitted and the further addition to occur soon, the conclusion reached settles the law only for the one case. I disagree so radically with some features of the opinion and regard the reasoning therein so infirm, as to bearing careful analysis, and the conclusion so contrary to the letter and spirit of our statute and the thought that dominates, as a rule, in taking insurance for the benefit of the family, that it seems best to state at some length the grounds therefor.

We cannot believe that—while, since *Clark v. Durand,* 12

Wis. 223, until 1891, the beneficiary in a policy of life insurance had been regarded as not having any interest, except contingent upon the policy maturing without the assured doing anything inconsistent therewith,—the legislature, by a statute, in its letter providing that such a beneficiary shall be deemed to be the owner of the policy and at its maturity, she then surviving, the proceeds shall be paid to her for her benefit, voicing the natural wish of a husband to extend protecting care over the wife beyond the period of possible personal attention thereto,—intended that the policy from the first should be a mere chose in action in the wife's hands, subject to the dangers incident thereto, of the purpose of the insurance being defeated during the lifetime of the husband. Such should not be declared the purpose of the legislature if that can reasonably be avoided. The assertion of counsel that married women are not properly the subject of special legislative care, that they should enjoy the same liberty as to property as is afforded to others, sounds well, but in practical life it is found that such liberty has its natural and necessary limitations. Mere theory should not move one efficiently as regards disturbing a legislative policy enabling one to assure protection to his wife after his ability to personally see thereto shall have ceased and to put the guaranty beyond her power and his to defeat it.

From the time this court first dealt with the subject under discussion till *Ellison v. Straw, supra,* though our law had some of the features of the law of Massachusetts, it was held, without exception, that a beneficiary had no right which the assured could not defeat before the maturity of the policy, whereas in Massachusetts a beneficiary, upon the issuance of a policy, became the absolute owner of it with perfect freedom of action in respect thereto. That doctrine which has never before found favor here, though repeatedly presented therefor, has now been adopted because of the act of 1891, which, to my mind, it seems, was designed to assure to the

beneficiary, she being a married woman, the indefeasible right to the policy benefits contingent only upon her living out the policy period.

The similarity of sec. 2347, Stats. 1898, to the law of Massachusetts supposed to exist, and to which controlling significance is given, we think will be seen to be a mere shadow. But if we were to concede the premise assumed, the reasoning based thereon would fail from the facts, not suggested in the court's opinion, that the supposed parent statute was not construed before its adoption here, and from the first till now our court has refused to follow the Massachusetts doctrine. It is indorsed now in part only. The suggestion is made that the court would not hold to what would seem to be the effect of the step taken, if the case depended on that, but would adhere to *Ellison v. Straw*. Thus is established, partly the doctrine of Massachusetts, partly that of New York, and partly that declared here prior to 1891.

It seems to me that one would infer from the court's reasoning that it has heretofore been quite in harmony with Massachusetts instead of with New York, while prior to *Ellison v. Straw* it was not in harmony with either, nor with courts elsewhere on the subject under discussion. How does it profit us on the question of assignability by a married woman of a policy made payable to her, to show that both courts have uniformly held that such a policy is assignable, when the ruling in one has been upon an entirely different ground from that in the other? One that the consent of the beneficiary is entirely immaterial, the assured being in absolute control, and the other that consent of the assured is immaterial, the beneficiary being in absolute control. Is it not a clear mistake of reasoning to speak of similarity of our statutes to that of Massachusetts when *Kerman v. Howard,* 23 Wis. 108, was decided, as important, and harmony of our decisions thereafter till *Ellison v. Straw,* or to class them with *Troy v. Sargent,* 132 Mass. 408; *Gould v. Emerson,* 99 Mass. 154, 97 Am.

Dec. 720; *Unity M. L. A. Asso. v. Dugan,* 118 Mass. 219, when the former were grounded on the idea that the beneficiary had practically no interest in the policy, except contingent upon the assured before its maturity not doing anything inconsistent therewith, and the latter on the idea that the beneficiary, though a married woman, is the absolute owner of the policy and may deal with it as she likes, subject to the provisions thereof, which may defeat it altogether?

It seems to be supposed that in *Archibald v. Mut. L. Ins. Co.* 38 Wis. 542, the court held that the married woman beneficiary could assign her interest; that nothing inconsistent therewith appears in our decisions till *Ellison v. Straw;* that it has been many times approved elsewhere, and that in *Ellison v. Straw* that was overlooked. That case was ruled necessarily by the rule of *Kerman v. Howard* that the assured may dispose of an insurance policy regardless of the wishes of the beneficiary, since the latter's interest is wholly contingent and under the assured's control. True, it is said in the opinion "there is nothing in our law which prohibits a married woman from making such an assignment," referring plainly to her beneficiary interest, which was something or nothing according to the will of her husband. It was merely suggested that such right as she had she could assign, since she was emancipated from common-law disabilities and there was no law prohibiting the assignment. We look in vain in the decisions for indorsement of the Massachusetts doctrine. The wife joined with the husband in the assignment. Without her act the effect would have been the same. *Kerman v. Howard* was followed. That was all. In the opening lines the court said:

"That it is competent for the owner of a life policy to assign the same so that the assignee may maintain an action thereon in his own name, is the settled law of this state, and it is quite immaterial that a married woman is beneficially interested in the policy."

We cannot think the court intended by the added language, entirely immaterial to the case, to suggest ownership by the beneficiary of the policy, or right to transfer it. True, such interest as the wife had, there was no law to prohibit her from assigning. But she had no real interest as it was then understood. The case did not turn on what she did in the slightest particular. True, the court said the husband and wife owned the whole interest in the policy, and having joined in making the assignment the same was valid, but the sole question was whether the act of the husband carried the whole interest in harmony with the previous decisions of this court.

It is said that the *Archibald Case* was never questioned in this court, but has frequently been cited with approval, referring to *Ballou v. Gile,* 50 Wis. 614, 619, 7 N. W. 561; *Bursinger v. Bank of Watertown,* 67 Wis. 75, 78, 82, 30 N. W. 290; *Estate of Breitung,* 78 Wis. 33, 35, 46 N. W. 891, 47 N. W. 17. True, those cases refer to the *Archibald Case,* but a careful reading of them fails to disclose the remotest suggestion of a reference for any purpose other than to show that the assured may assign his policy without the consent of the beneficiary, and thereby defeat the latter's interest. In the last case COLE, C. J., stated the question ruled by the *Archibald Case* thus:

"Can a person who has procured a policy of life insurance on his own life for the benefit of another, and has paid the premiums thereon as they became due, dispose of the insurance money by will to the exclusion of the beneficiary named in the policy, during the lifetime of such beneficiary?"

We fail to see how that case throws any light whatever on the proposition now at issue.

My brethren further say the *Archibald Case* has been cited with approval in various jurisdictions, suggesting such use to support the proposition that a married woman beneficiary may assign the policy. We appreciate that the broad proposition is unnecessary to this case, but the logical effect of my breth-

ren's reasoning goes to the limits of it. It goes to the extent of holding that a wife, without the consent of the husband, may sell the policy before it matures, and that it may be taken for her debts as held in Massachusetts, in *Troy v. Sargent, supra,* cited in the opinion. It is largely to call attention to the far-reaching scope of the reasoning of my brethren that I write this opinion.

The decisions elsewhere given as supporting the views of the *Archibald Case* now taken by my brethren are: (1) *Metropolitan L. Ins. Co. v. O'Brien,* 92 Mich. 584, 589, 52 N. W. 1012; (2) *Amick v. Butler,* 111 Ind. 578, 582, 583, 12 N. E. 518; (3) *Davis v. Brown,* 159 Ind. 644, 647, 65 N. E. 908; (4) *Binkley v. Jarvis,* 102 Ill. App. 59, 64; (5) *Newcomb v. Mut. L. Ins. Co.* 18 Fed. Cas. No. 10,147 (p. 47); (6) *New York M. L. Ins. Co. v. Armstrong,* 117 U. S. 591, 597, 598, 6 Sup. Ct. 877. In 1 the *Archibald Case* is cited solely to the proposition that the assured may assign the policy to secure a creditor. In 2, 3, 4, and 6 it is cited to the proposition that the assured may assign the policy as he may assign any chose in action. In 5 it is cited to the proposition that "this and most courts hold to the doctrine that a married woman who is the beneficiary in an insurance policy has the full dominion over it, and may sell, assign, or pledge it like her other separate property." In neither 1, 2, 3, 4, nor 6 was the right of the beneficiary involved at all. The use of the case was only legitimate to the point that a policy of life insurance is assignable by the assured. In 5 a manifestly illegitimate use was made of the case, because it was not even remotely hinted by this court that a beneficiary has the dominion over the policy.

Some general statements in the opinion of the court as to the bearing of the *Archibald Case* with *Kerman v. Howard,* and the bearing of the two with the Massachusetts cases, to my mind are liable to mislead. It is said that *Kerman v. Howard* went further than the *Archibald Case;* that whereas

the former is to the effect that the assignee, regardless of his wife, may transfer the whole interest in the policy, in the latter it is said "the husband and wife together owned the whole interest in the policy and hence could transfer the same by joining in an assignment thereof." If one can see in the *Archibald Case* that the policy there involved passed by assignment *because* the assured and the beneficiary joined in the assignment, and see even a remote suggestion that the beneficiary possessed any interest not extinguished by the assignment by the husband regardless of her conduct, the case furnishes some support for the use made of it. But how can we square the court's view with the plain language of Justice LYON, which we have already quoted, saying that the act of the wife was entirely useless?

Further it is said, for the same reason *Kerman v. Howard* goes beyond the *Archibald Case* it goes beyond the Massachusetts cases. That suggests that there is some line of consistency between the two, when, as we have seen, they are as opposite as the poles, one holding that the insured may assign his policy, conveying the whole interest regardless of the wife where she is the beneficiary, and the other that she may assign the whole policy regardless of the husband.

The legislative purpose in changing the law in 1891 can be best seen by viewing the conditions then existing with the vision unclouded by the idea that prior thereto our decisions were to some extent in harmony with those of Massachusetts under a similar statutory condition, and keeping in mind the isolated situation of our court, not only as to the judicial policy of Massachusetts, but courts generally on the subject, and the radical differences between the statutes of the two states which furnish some reason for judicial conflict. It hardly helps to refer to *Central Bank v. Hume,* 128 U. S. 195, 9 Sup. Ct. 41; *Glanz v. Gloeckler,* 104 Ill. 573, and like cases holding that where one takes out a policy of life insurance upon his life for the benefit of another, that other, as a

matter of course, upon the issuance of the policy becomes the absolute owner of the entire beneficiary interest therein, the contract not providing otherwise, some of such cases going so far as to hold that the contract is in effect with the beneficiary. *Glanz v. Gloeckler, supra.* A general reference to such cases, in a way to suggest that they to any extent voice the law as it existed here prior to 1891, or throw light upon the purpose of such law, tends to confuse, rather than to aid in arriving at a correct solution of the question under discussion.

Let us look at the origin of our statute as it existed in 1891, and point out the differences between our original act and that of Massachusetts, which we are told it so much resembles. Ch. 82, Laws of Massachusetts for 1844, the so-called "parent law," is in the main as follows:

"SECTION 1. Any policy of insurance made by any insurance company on the life of any person, expressed to be for the benefit of a married woman, whether the same be effected by herself or by her husband, or by any other person on her behalf, shall inure to her separate use and benefit and that of her children, if any, independently of her husband and his creditors and representatives, and also independently of any other person effecting the same in her behalf, his creditors and representatives, and a trustee or trustees may be appointed by any court authorized to appoint trustees, to hold and manage the interest of any married woman in any such policy or the proceeds thereof.

"SEC. 2. Where a policy of insurance is effected by any person on the life of another, expressed therein to be for the benefit of such other, or his representatives, or for that of a third person, the party for whose benefit such policy is made shall be entitled thereto as against the creditors and representatives of the person so effecting the same."

The law here supposed to have been modeled thereon, ch. 158, Laws of 1851, is as follows:

"SECTION 1. Any policy of insurance made by any insurance company on the life of any person, expressed to be for

the benefit of a married woman, whether the same be effected by such married woman or by her husband or by any other person on her behalf, shall inure to her sole and separate use and benefit and that of her children if any independently of her husband and of his creditors and representatives, and also independently of any other person effecting the same in her behalf his creditors and representatives and in case of the death of the husband of such married woman such policy and the benefit thereof shall not go to his executors or administrators but shall belong to such married woman, and shall be for her sole use and behoof and that of her children.

"SEC. 2. That in case of the death of any married woman for whose benefit and that of her children such policy of insurance was effected it shall and may be lawful for any court having authority to appoint guardians for the minor children of such deceased married woman, which guardian so appointed shall have power to hold and manage the interest of such minor children in any such policy or the proceeds thereof.

"SEC. 3. When a policy is or has been effected by any person on the life of another, expressed therein to be for the benefit of such other his representative or for that of a third person, the party for whose benefit such policy is made shall be entitled thereto, as against the creditors and representatives of the person so effecting the same."

A complete key to our law as it stood in 1891 must include ch. 80, Laws of New York for 1840, which is, in the main, as follows:

"It shall be lawful for any married woman, by herself, and in her own name, or in the name of any third person, with his assent, as her trustee, to cause to be insured, for her sole use, the life of her husband for any definite period, or for the term of his natural life; and in case of her surviving her husband, the sum or net amount of insurance becoming due and payable, by the terms of the insurance, shall be payable to her, to and for her own use, free from the claims of the representatives of her husband, or any of his creditors; but such exemption shall not apply where the amount of premium annually paid shall exceed three hundred dollars."

That was substantially adopted here by ch. 182, Laws of 1862, in these words:

"It shall be lawful for any married woman to cause to be insured for her sole use, the life of her husband, her son, or any other person, for any definite period, or for the time of the natural life of such husband, son or other persons [person]; and in case of her insuring such husband, son or other person, the sum or net amount of the insurance becoming due and payable by the terms of the insurance, shall be payable to, and for the sole use of such married woman, free and exempt from the claims of the representatives of such husband, son or other person, or of their or any of their creditors, respectively: *provided,* that such exemption shall not apply where the amount of the premium annually paid shall exceed three hundred dollars, unless it shall appear that such premium shall have been paid out of the moneys or funds belonging to such married woman; *and provided further,* that such exemption shall apply to the insurance money covered by the premium annually paid up to and including the sum of three hundred dollars."

The main features of the act of 1851 and the act of 1862, the former, however, not being specially referred to, were embodied in sec. 19, ch. 59, Laws of 1870, which, without material change, constituted sec. 2347 of the Statutes, prior to the act of 1891. Such section may be conveniently presented for analysis by numbering the significant parts, inclosing in parentheses those which in letter or substance are like the Massachusetts law, and inclosing in dashes those which are in letter or substance like the New York law adopted here, as stated.

1.—"Any married woman may, in her own name or in the name of a third person as her trustee, with his assent, cause to be insured for her sole use the life of her husband, son or other person for any definite period, or for the natural life of such person;—2. (and any person, whether her husband or not, effecting any insurance on his own life or on the life of another, may cause the same to be made payable) or as-

sign the policy (to a married woman) or to any other person in trust for her benefit; (and 3. every such policy, when expressed to be for the benefit of) 4. or assigned—or made payable to (any married woman)—5. or any such trustee, 6. (shall inure to her separate use and benefit and that of her children,) 7.—and in case of her surviving the period or term of such policy the amount of the insurance shall be payable to her or her trustee for her own use and benefit,—8.—(free from claims of her husband and of the person effecting and assigning such insurance and from the claims of their respective representatives and creditors.)—"

It will be seen that 1. was taken from our act of 1862 and "as to insurance upon the life of the husband" is from the New York act of 1840, and is not in the Massachusetts law in any form. 2., as regards policies expressed to be payable to married women, is in our act of 1851 and the Massachusetts law of 1844. That part as to policies assigned to a married woman is not in either act. It appears first in our act of 1870, which was framed with special reference to the law of 1862, but without any mention of the law of 1851. 3. is in the Massachusetts law and in our act of 1851. 4., as to policies payable to married women, is wholly from our act of 1862, and as to policies assigned to married women is first found in our act of 1870. 5. is first found in the law of 1870. 6. is in the Massachusetts law and our act of 1851. 7., a vital feature, is not in the Massachusetts act. The idea thereof is in our act of 1851, and the phrasing adopted in the act of 1870 followed the law of 1862. Aside from the word "benefit," which makes the clause more emphatic, it is the exact counterpart of the New York act and our law of 1862. 8. is found in the Massachusetts law and our act of 1851, so far as applicable thereto, and in the act of 1862, so far as applicable thereto, with changes to harmonize with the new features added in 1870.

Thus it will be seen that our law, prior to the act of 1891,

originated in 1870, without any special reference to the law of 1851, but with special reference to the act of 1862, adopted from New York. The words "inure to the benefit of" in the Massachusetts law, not being coupled with any provision as to when the clause should operate, the court there held that it operated instantly, making the policy the property of the wife immediately upon its issuance. In our law at first, as shown, such words being coupled with others indicating that the legislative intention was that the clause should become operative only upon the maturity of the policy, the court held that in the meantime it was in abeyance and its effect conditioned upon who was the beneficiary at the maturity of the policy. There was no question but that under that feature of the New York law of 1840, as construed there prior to its incorporation into our law of 1870, a policy within its terms was the property of the beneficiary from the time of its issuance, subject to be realized on by her and her only upon the death of her husband, she surviving, regardless of the acts of either in the meantime as to assigning the same. A policy of that character or any other, whether expressed to be for the benefit of a married woman as in the former law and the law of Massachusetts, or in any other way designed for the benefit of such a person, was put into a general class, followed by the words "shall inure to her separate use and benefit," "and in case of her surviving such period or term the sum or net amount of the insurance becoming due and payable by the terms of the insurance shall be payable to her, to and for her own use and benefit," thus giving significant prominence to the feature of the New York system not found in that of Massachusetts, largely influencing the holding in the former that such a policy was not assignable, at the same time preserving that feature which formed the only justification for the doctrine that the word "inure" referred to the maturity of the policy, and if the married woman was not then the beneficiary, which depended wholly upon the will of the husband,

she could not take the insurance. The further feature of the Massachusetts law which contemplates the appointment of a trustee for a married woman to manage *the policy and the proceeds,* suggesting care by and for her of the policy as her individual property before its maturity, is not found in our act of 1851, nor any other legislation here on the subject. The absence thereof harmonizes with the idea that the legislature intended the beneficiary not to have any interest in the policy, except in the event of her surviving the termination of the policy period, and her status as beneficiary not having been terminated in the meantime by the act of the assured.

When our act of 1862 was passed it was not doubted anywhere, as we understand, but that a policy of insurance payable to a married woman, as the statute seemed to plainly say, would inure to her benefit in case of her surviving the policy period. It has not yet been held in Massachusetts that the beneficiary interest of the woman could be sold by her or taken adversely by her creditors, while this court had not yet held that the statute did not interfere with the absolute control by the insured over the policy during his lifetime. It was not so held till 1868. *Kerman v. Howard,* 23 Wis. 108. It seems that the legislature in adopting the New York law as an independent act must have had a distinct purpose in view, other than to enable a married woman to take out a policy of insurance upon the life of her husband or another, because that existed by necessary inference from the act of 1851, and independently thereof. The legislature must also have had a definite purpose in passing the act of 1870, in putting the law in the form it existed in 1891, without special reference to the law of 1851, but with strict regard to the law of 1862, by which all policies payable to married women, issued upon the lives of others, were put in one class and it was provided that upon the woman surviving till the termination of the policy period the proceeds should be paid to her for her sole use and benefit, using the feature in that regard

of the New York law which had been seven years before held in *Eadie v. Slimmon,* 26 N. Y. 9, to render the policy unassignable by any one in any way. That case was decided before this court had taken its stand or Massachusetts had declared the effect of its law. When our act of 1870 was framed the conflicting attitudes of the courts were fully known. The fair explanation of the conflict at first was the variances between the laws, which we have noted, indicating that the legislative purpose here was that the interest of the married woman should only attach at the maturity of the policy. The legislature may have sought to make such purpose apparent as to all policies for the benefit of married women, not issued on their own lives, by framing the law of 1870 without special reference to the act of 1851, but with such regard to the act of 1862, preserving the feature as to payment to a married woman in case of her surviving the policy period and making it applicable to all such policies. Does it not seem quite plain that the rule of *Eadie v. Slimmon, supra,* was in mind at the time of the legislation of 1870, at least to the extent of its bearing on the rights of a married woman surviving till the termination of the policy period, she being then the beneficiary?

We see no force in the suggestion that the New York law only provided for widows, and that our act of 1862 and the feature thereof now in sec. 2347 includes married women not widows. The extension of the law merely extended the principle thereof.

The rule of *Eadie v. Slimmon* in New York is by no means confined to policies taken out by married women. It applies there to all policies payable to such women issued on the lives of others, so far as not otherwise provided in the written law. There is a strong reason for saying that it was so regarded at the time of the passage of the act of 1870, since a most significant feature of the law on which it was based was then,

as we have seen, *ex industria* made to apply generally to all policies therein mentioned, as before indicated.

We are wholly unable to see any reason for saying that the rule of *Eadie v. Slimmon* has been judicially changed in New York. True, there are expressions of judges, here and there, which can be gathered together, showing some disfavor, but, generally speaking, the indications are the other way, and the decisions are universally so. That there should be some judicial leaning towards the right of a married woman to dispose of her insurance as she sees fit need not be wondered at, but that the general trend of judicial authority in New York is in favor of protecting such persons against danger of parting with their policy rights before maturity, seems certain. No discredit should be cast on the early New York case, because it was founded on a law as to the rights of married women before their emancipation from common-law disabilities. After such emancipation, and some twelve years after the early decision was rendered, it was carefully reviewed in *Barry v. Equitable L. A. Soc.* 59 N. Y. 587, and there in the light of the new situation, upon the ground of *stare decisis* and reason as well, looking at the matter as an original proposition, it was approved. So important did it seem that the principle early declared should not be judicially impaired that the court went somewhat out of its way to say:

"Legislation enlarging the legal capacity of married women does not supersede the act of 1840, nor give to them other power to deal with a policy issued under it than they had by it; for the reason that the act is an enabling act, confers a special privilege, and is in the nature of a law exempting goods from execution; that the privilege is given in view of an especial legislative intention and policy, which would be subverted if the contingent interests arising under it could be treated and dealt with as the separate property of a married woman, to be disposed of or affected by her subsequent contracts."

The legislative change authorized a married woman with the consent of her husband to assign her beneficiary right, and whereas before upon the maturity of a policy the proceeds were required to be paid to her for "her sole use," etc., thereby the same was required to be paid "as her sole and separate property." The court regarded the substitution of "as her sole and separate property" for "for her sole use," and the substitution of partial for total disability, as to the assignability of the beneficiary right, as requiring it to hold such right assignable upon the conditions precedent mentioned in the statute, and that as soon as payment of the policy to the beneficiary herself ceased to be contingent the policy right was liable for her debts the same as any other of her "separate property."

It will not be profitable to extend this opinion by giving a history of *Eadie v. Slimmon* outside of New York. We venture to say, however, that it has never been disapproved in face of a plain written law exempting a married woman's beneficiary right from the claims of creditors of the assured, and providing that at the maturity of the contract the proceeds of the policy shall inure to her separate use and benefit and that of her children, and in case of her surviving shall be payable to her and no one else. The significant words of the original New York statute, as adopted here, which, as shown in *Amberg v. Manhattan L. Ins. Co.* 171 N. Y. 314, 316, 317, 63 N. E. 1111, needed to be changed before the beneficiary right could be reached by creditors, even after the maturity of the policy, prior to the proceeds reaching her hands, are present today in our statute and are absent from the Massachusetts statute, as we have seen.

In view of the foregoing it seems plain that there is no harmony between the decisions here and those of Massachusetts, or those here and elsewhere, or between the Massachusetts statute and ours, which furnishes any key to the legislative purpose intended to be expressed in the act of 1891.

Until *Ellison v. Straw* our status was one of complete isolation. We had a combination of the statutory systems of Massachusetts and New York and some new features, and our decisions were entirely out of line with those of both states and decisions elsewhere. Our law at first provided that an insurance policy upon the life of a husband expressed to be for the benefit of his wife should inure to her own benefit and that of her children, free from any claims of his creditors. That taken by itself, as an original proposition, one might well say was intended to secure to the wife and and her only, she surviving the assured, the right to the proceeds of the policy beyond his power to defeat it other than through some valid provision forfeiting the contract. Subsequently it was further provided that if the wife survived the assured "the amount of insurance shall be payable to her . . . for her own use and benefit," free from the claims of others, and the two features were joined in one general provision after that borrowed from New York was construed there and Massachusetts had taken its stand on the feature adopted from there and this court had held differently in respect thereto as regards the features in combination. Probably a layman at least would say the legislative purpose was unmistakable to preserve the wife's beneficiary right so that in the event of her surviving the policy period the proceeds would come to her and to her only, and for her use and hers only, subject, of course, to be treated after so coming the same as any other of her "sole and separate property," yet this court adhered for years to the policy of isolation before indicated. As stated in *Ellison v. Straw:*

"Notwithstanding studied efforts of lawmakers, by statutory restrictions, to guard life insurance made payable to a married woman, so that she will enjoy the same in case of her surviving till the maturity of the policy, to take according to the terms of the contract, the door was left wide open, under the judicial policy of this state, for the person taking out the policy and paying the premiums, she being a mere beneficiary,

to destroy her rights in that regard at any time at his pleasure, by designating some other beneficiary to take in her place, or by disposing of the insurance by will."

Though the statute permitted easily of a contrary reading, till the maturity of the policy with conditions unchanged the beneficiary was regarded as having no interest therein which the assured was bound to respect.

Such was the situation faced by the legislature of 1891. *Eadie v. Slimmon* had been reconsidered in New York in the light of legislation there affecting it and affirmed upon principle and authority and held applicable to all insurance in favor of married women upon the lives of others payable to them at maturity. The significant statutory feature giving rise thereto, in part, had been incorporated into our system. The common idea of such insurance was to extend help to women in widowhood, or women with future possibilities in that regard, and to put efforts in that respect beyond the power of the beneficiary and that of any one else to defeat the same. With that picture in view, as the legislature must have seen it, what was intended by what it did, if there is any uncertainty in respect to the matter, is strongly suggested by what men would naturally do under the circumstances. If there be any idea more remote from the thoughts of men in general in taking out life insurance of the kind under consideration than any other, it is that the policy when obtained will be mere free property in the hands of the wife as soon as secured, subject to be disposed of by her at pleasure. In the light of the well-known rule for statutory construction, "the court should look to the whole and every part of the statute, and the apparent intention derived from the whole, to the subject matter, to the effects and consequences, and to the reason and spirit of the law, and so construe it as to harmonize and give a sensible effect to every portion" (*Harrington v. Smith,* 28 Wis. 43)—can we well doubt what the real legislative purpose was?

What was required in 1891 to make effective what we venture to affirm is the common thought as to insurance for the benefit of a wife? The law then provided that the insurance "shall inure to her separate use and benefit" . . . and upon maturity "shall be payable to her for her own use and benefit," free from the claims of her husband or any one claiming under or through him. That was inefficient because of the judicial construction, so firmly entrenched that only the legislature could remedy it, that the language related to the condition existing at the maturity of the policy which the husband could at his will control. There was nothing in our decisions suggesting that the wife's mere contingent right could be separated from the husband's right and sold by her or taken from her adversely, or that her consent to its transfer was necessary to enable the husband to sell the policy. We had the New York feature which, given its legitimate effect, would fully protect the wife subject to the right of the husband to allow the policy to lapse. The Massachusetts feature, under which immediately upon the issuance of the policy it was there held to be a subject of absolute ownership by the beneficiary, was not favored. It seems quite plain that the legislature supposed that what was needed to secure to the wife, and to her only, the beneficiary right in case of her surviving to take at the maturity of the policy, was to abolish the rule that existing statutes referred to conditions existing at the maturity of the policy, leaving the husband in the meantime in absolute control. What would most clearly accomplish that? Provide that the policy "shall be the sole and separate property of said married woman," placing those words before the words "shall inure to her separate use and benefit," thereby leaving the courts no room for holding that the condition of "sole and separate" ownership was postponed to the time to which it had formerly been held the words "inure to her separate use," etc., pointed, and emphasizing the interpolated words beyond all possibility of misapprehension as to

their import by placing between the words "free from," etc., and the words "claims of her husband," etc., the words "the control, disposition or." That, omitting parts not material here, being done, the law took this form:

(New York feature) "Any married woman may, in her own name . . . , cause to be insured for her own use the life of her husband, . . . ; and (Massachusetts feature in effect) any person, whether her husband or not, effecting any insurance on his own life . . . may cause the same to be made payable . . . to a married woman . . . ; (Massachusetts feature) and every such policy, when expressed to be for the benefit of . . . (New York feature) made payable to (joint feature) any married woman . . . , (new feature) *shall be the sole and separate property of such married woman and* (Massachusetts feature) shall inure to her separate use and benefit and that of her children, (New York feature) and in case of her surviving the period or term of such policy the amount of the insurance shall be payable to her . . . for her use and benefit, free from (new feature) *the control, disposition or* (New York and Massachusetts feature) claims of her husband and of the person effecting or assigning such insurance and from the claims of their respective representatives and creditors."

With the thought that was given to the matter when *Ellison v. Straw* was decided it became manifest to us all that the legislature intended by the act of 1891 a radical change. That idea has been confirmed by subsequent study. It seemed to us all then that the right of the matter had been reached. No favor was given then to the idea which now prevails, but it was thought to be quite clear that the legislature intended to so provide that the right of a married woman, when a beneficiary in a life insurance policy, would be contingent only upon the policy being kept in force and her surviving to take under it; that till the proceeds thereof were reduced to possession they should be safe from imprudent conduct on her part and the acts of others, in harmony with the presumed intent of the assured person in such cases. It was thought then that

the will of the legislature in that regard was quite plain, and it seems to me so now. It was reasoned then that if the legislation permitted of two constructions, that one should be adopted giving to a married woman the fullest measure of protection at the maturity of her policy right. It was supposed that the legislature had taken radical action to eradicate completely the system that had grown up here as to the rights of such persons in such circumstances. The disinclination of the court theretofore to recede from its ancient moorings in the face of a legislative command, so to speak, to do so, the court being so entrenched in such position that such command was not appreciated, was seen, in that while the legislative purpose seemed plain the court, when first called upon to act in the matter in *Strike v. Wis. O. F. M. L. Ins. Co.* 95 Wis. 583, 70 N. W. 819, said no change was intended from the rule of *Foster v. Gile,* 50 Wis. 603, 7 N. W. 555, 8 N. W. 217. So a studied attempt, after a careful analysis of the statute in all its aspects as to the right of the matter, was made to discover it, and all concurred in the reasoning and in the result.

In this opinion we have gone over the subject matter in hand as an original proposition without discovering any reason why the conclusions reached in *Ellison v. Straw* are not right as to the point under discussion. My remembrance is that the opinion correctly mirrors the discussions which led up to the writing of it.

It is suggested that the question of the assignability of a married woman's beneficiary right in a life insurance policy was not involved in *Ellison v. Straw;* that the sole question was whether such right could be seized and appropriated by creditors and that such question is not here, "but we have no disposition or purpose to indicate that, if it were, we should hesitate to adhere to that decision," thus affirming the adoption of the rule of *Eadie v. Slimmon* so far as it was grounded on the unassignability of the policy and rejecting the Massa-

chusetts rule in *Troy v. Sargent, supra.* One view is favored in harmony with Massachusetts, while the logical effect is rejected in favor of the New York idea, which springs from a construction of language which is here rejected.

In *Ellison v. Straw* the question of whether the policy was assignable was supposed to be the supreme test of whether it could be taken from the beneficiary in adversary proceedings for the payment of her debts. I am entirely unable to appreciate the statement that the consideration of the supposed underlying question was beyond the ultimate one to be decided. Is it true that it is not legitimate in reasoning up to a conclusion as to the existence of a fact in controversy which is assumed, rightly as is supposed, cannot exist in the absence of either of several other disputed facts, to take up the minor propositions, either of which being solved in the negative would demonstrate nonexistence of the ultimate disputed fact? If so, our ideas of logic are all wrong.

One of the turning points in all discussions in New York as to whether a policy could be seized by the creditors of the wife was whether it was assignable by her. *Baron v. Brummer,* 100 N. Y. 372, 3 N. E. 474; *Amberg v. Manhattan L. Ins. Co.* 171 N. Y. 314, 63 N. E. 1111. Our statute nowhere says expressly that the beneficiary right of a married woman at any time shall be exempt from the claims of her creditors. If it is her absolute property presently, as held in Massachusetts and elsewhere, there is no legitimate ground for holding it to be beyond the reach of creditors, except that it is unassignable under the law declaring that it shall be paid to her for her use and benefit at maturity.

Before we are through with this subject we must take hold fully and firmly of one horn or the other of the dilemma which our statute and previous holdings present. That, it was supposed, was fully appreciated in *Ellison v. Straw* and involved, necessarily, consideration of whether the policy was

assignable or not. The point there urged most strongly upon the court, as it would appear from the opinion, and as the fact is, as abundantly shown by the briefs of counsel on both sides, is the one now said to have been outside the case. I would not venture to go this far if the matter rested only in memory, however much it may be said to be corroborated by the opinion. The briefs used upon the argument leave the matter unmistakable. I must assume that they were not carefully examined in the preparation of the opinion of the court. My remembrance is that the point given the greatest attention then, as the surest test of whether the policy was attachable, is the one now turned aside as not having been rightly considered. We are unable to see now how any logical basis can exist under the statute for holding that the policy right cannot be reached by creditors in an adversary way, and yet that it is a mere chose in action subject to be transferred by the beneficiary at her will in advance of maturity.

It is urged that in deciding the former case *Archibald v. Mut. L. Ins. Co.* was overlooked. My brethren of the majority take that view. I do not so remember it. The case was cited then and commented on in appellant's brief to the point that the policy was assignable by the beneficiary, and the respondent replied thereto briefly, saying that the language relied upon was a mere side remark and had no significance, the policy being assignable regardless of the attitude of the wife. The facts in that regard being perfectly apparent and not pressed upon the court particularly, the case was not cited in the opinion. It were better if it had been and the opportunity not afforded for saying it was overlooked. It was considered utterly unimportant as to the decision of the court.

One very important feature of our present situation, one that my brethren have entirely overlooked, remains to be mentioned. If appearances are not misleading, the doctrine of *Ellison v. Straw,* so far as not modified by the legislature, has

become incorporated into the written law. By ch. 15, Laws of 1903, enacted in view of the construction given by this court to the act of 1891, it was provided that

"any married woman may, with the written consent of the person effecting the insurance, assign, encumber or dispose of any right, title or interest she may have in, to or under any policy of life insurance, whether on the life of herself or her husband, or of any other person, and whether such policy be expressed to be for the benefit of or assigned or made payable to such married woman, or in trust for her, in the same manner and with like effect as if she were unmarried. The provisions of this act shall apply to all insurance on lives, whether effected before or after the passage of this act, but shall not apply to assignments thereof heretofore made."

While the retroactive feature thereof is probably not effective, the distinct recognition of the doctrine of *Ellison v. Straw* and effort not to go counter thereto as to assignments already made, and determination to remove the disability of married women to assign, under certain circumstances, by necessary inference provided that the policies not referred to should be wholly unassignable. *Expressio unius est exclusio alterius.*

The purpose of partially removing the disability of married women, as above, was probably to enable them to use their policies, under certain conditions, as security for borrowed money, thus partly undermining the common purpose of such insurance. It were better if the ordinary life policy for the benefit of a wife were not assignable at all before maturity, except to procure money when necessary to protect it. It were better if insurance companies would promote that system, instead of seeking to undermine the ancient beneficent purpose of such organizations, sacrificing that for the purpose of securing aid in the making of investments. But that is wholly a matter of policy, not entitled to weight here, except as it is helpful in determining the meaning of ambiguous laws involving the subject.

Now we will draw this opinion to a close, making no apology for its length, but again expressing regret that the point discussed could not have been left undecided till a conclusion could be reached that would be considered final under existing statutes. Since it was supposed that the question should now be met and a decision made that would at least reopen what would otherwise appear closed by *Ellison v. Straw,* duty impelled me also to go at length into the matter, expressing with fulness the grounds of my dissent from the court's conclusion. The judicial discussion on both sides will be helpful to bench and bar when the matter shall be presented again. In my treatment of the matter I have intended to cover the whole field, what has been decided and the legitimate effect, which I think will be claimed for it, contrary to that which my brethren suggest they would not hesitate to decide if it were now up to them to do it. Having taken a step in the wrong direction with the best of resolutions that we will not take another, when to go further, having started, is the natural or necessary consequence of the digression, it is most liable to occur, or a return movement be indulged in, or an incongruous position be adopted.

Our conclusion is that the judgment should be reversed, because the policies are governed by the law as it stood prior to 1891, but otherwise that it would have to be affirmed on principle and on authority of *Ellison v. Straw.*

SIEBECKER, J. I concur in the opinion of MARSHALL, J.

KERWIN, J., took no part.

FRANCISCO, Respondent, vs. HATCH, Appellant.

December 13, 1904—February 21, 1905.

Affirmance on equal division of court.

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The decision upon a former appeal in this action is reported in 117 Wis. 242.

The cause was submitted for the appellant on the brief of *R. E. Noyes,* and for the respondent on that of *Dithmar & Carow* and *Grotophorst, Evans & Thomas.*

The following opinion was filed January 10, 1905:

CASSODAY, C. J. This cause was originally tried at the circuit before Mr. Justice SIEBECKER, now a member of this court. The other members of this court find themselves equally divided on the question of the admission of certain evidence, and this necessarily results in an affirmance of the judgment.

By the Court.—The judgment of the circuit court is affirmed.

SIEBECKER and KERWIN, JJ., took no part.

Mr. Justice KERWIN having become a member of the court and taken his seat at the January term, 1905, the appellant moved for a rehearing, urging, among other things, that five justices would be qualified thereon to determine the questions involved in the appeal.

For the respondent it was contended that a defeated party cannot secure a reargument in the appellate court merely because there has been a change in the membership of the court, citing *Shreveport v. Holmes,* 125 U. S. 694; *People v. New York,* 25 Wend. 252; *Mason v. Jones,* 3 N. Y. 375; *Stearns*

v. Hemmens, 3 N. Y. Supp. 16; *Peoples v. Evening News Asso.* 51 Mich. 11; *Woodbury v. Dorman,* 15 Minn. 341; *Ayer v. Stewart,* 16 Minn. 89; *Devereux v. Devereux,* 81 N. C. 12. See, also, *Gibbs v. Seibt,* 118 Wis. 145; *Jacobs v. Queen Ins. Co.* 123 Wis. 608.

The motion was denied February 21, 1905, Justices SIEBECKER and KERWIN taking no part in the decision.

MERRICK, Appellant, vs. NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY, Respondent.

December 15, 1904—February 21, 1905.

Life insurance: Wrongfully declared forfeiture: Right of action of wife as beneficiary: Joinder of parties: Measure of damages.

1. Where, under sec. 2347, Stats. 1898, and the terms of the policy, insurance on a husband's life was to go to his wife as her separate property if she survived him, otherwise to his heirs, neither the husband nor his heirs are necessary parties to an action by the wife against the insurance company for damages, based on the wrongful act of the company in declaring the policy forfeited.
2. The wife has a cause of action in such a case against the insurance company, although the husband is still living; and the measure of her damages is the value of the policy at the time it was so declared forfeited.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

This is an appeal from an order sustaining a demurrer to a complaint alleging, in effect, that the Madison Company therein mentioned [the Northwestern National Life Insurance Company of Madison, Dane County, Wisconsin] was incorporated under the laws of this state in 1882; that February 22, 1883, the plaintiff's husband, Noel N. Merrick, became a member of that company and procured from that

company insurance on his life for $4,000, which was subsequently reduced to $1,000, payable as hereinafter mentioned; that the Madison Company was reincorporated in January, 1892, under the laws of this state then in force; that the Madison Company was again reorganized and reincorporated in 1899 under the laws of this state then in force; that October 7, 1899, the Madison Company changed its name so as to be the same as the defendant's name; that after the defendant was duly incorporated under the laws of Minnesota, and after it was duly licensed and authorized to do business in this state, and after it was fully and duly empowered and authorized to consolidate with and reinsure the risks and the members of the Madison Company, it did so consolidate and reinsure the risks and members of the Madison Company under the laws of this state then in force, and the Madison Company, on August 29, 1901, transferred all its members and risks and all its insurance contracts and obligations and duties, including its duties and obligations to the plaintiff and her husband, and all its duties and obligations to its members, including the plaintiff and her husband, to the defendant company, and at the same time and place the defendant assumed and reinsured all the risks and members of the Madison Company, including the membership and risk and certificate of membership of the plaintiff's husband, and at the same time and place the Madison Company assigned, transferred, and set over and delivered to the defendant all of its property of every nature and kind, and the defendant accepted and carried the same away, and the Madison Company thereupon went out of business; that from and after August 29, 1901, the defendant undertook to and did carry out and perform the duties and obligations due to the plaintiff and her husband according to the terms and conditions of his certificate of membership; that in 1898 the Madison Company issued and delivered to the plaintiff's husband a new certificate of membership and contract of insurance, dated

January 4, 1898, in and by the terms of which the plaintiff's husband was obliged to pay, within thirty days after due notice by mail at his postoffice address at Meadow Valley, Wisconsin, $1.30 on the maturity of the certificate of any other member of the Madison Company; that said certificate also contained the following: That the Madison Company, upon due proof of the death of Noel N. Merrick, within sixty days after due proof and allowance thereof and of the plaintiff's claim or right, would pay to the plaintiff, if living, but in case of her death would pay *his heirs,* the amount of eighty per cent. of an assessment levied upon and collected from all the members of the Madison Company, not to exceed $1,000.

The complaint also alleges, in effect, that the plaintiff is the wife of Noel N. Merrick, and sole beneficiary named in the certificate, and, if living at the time of his death, she alone will have and receive the benefit, not exceeding $1,000; that she is the owner and holder and possessor of the certificate, and the annual assessments do not exceed $150; that an assessment levied upon and collected from all the present members of the Madison Company would far exceed the $1,000; that Noel N. Merrick has paid all assessments ever noticed to or required of him by either of the respective companies mentioned, and has kept and performed all the conditions and agreements contained in his contract; that June 3, 1902, he paid $3.55, which would have become due June 10, 1902, on assessment No. 104; that July 29, 1902, he remitted to the defendant $3.55, which would have become due August 10, 1902, on assessment No. 105, but which the defendant refused to accept, and declared that Noel N. Merrick had lapsed and forfeited his certificate and membership; that Noel N. Merrick protested, and insisted that he was still a member in good standing, but the defendant persisted that he was a lapsed and forfeited member by reason of the nonpayment of assessment No. 104, mentioned, and that his only right was an application for reinstatement after he should

submit to a medical examination showing that he was insurable; that he was then in poor health, suffering from rheumatism and from disease of the heart, and was not insurable, and could not pass such examination successfully—of all of which he informed the defendant; that he is sixty-six years of age, and by the American Experience Tables his life expectancy is ten years; that in case of his death the members of the Madison Company would be liable thereon to an amount exceeding $3,000; that by the wrongful acts of the defendant aforesaid the plaintiff had been injured and damaged in the sum of $1,000, for which amount she demands judgment.

Frank E. Parkinson, for the appellant, argued, among other things, that whenever an insurance company wrongfully refuses to accept payments and to carry out the contract of insurance—wrongfully puts an end to it,—the real party in interest may sue at once and recover full damages. 1 Phillips, Ins. § 505; *U. S. v. Behan,* 110 U. S. 338; *Lovell v. St. Louis Mut. L. Ins. Co.* 111 U. S. 264; *People v. Security L. Ins. & A. Co.* 78 N. Y. 114, 125; *Martine v. International L. Ins. Soc.* 53 N. Y. 339; *Thompson v. New York L. Ins. Co.* 21 Oreg. 466; *New York L. Ins. Co. v. Statham,* 93 U. S. 30; *Hedden v. Griffin,* 136 Mass. 229; *Clemmitt v. New York L. Ins. Co.* 76 Va. 355; *Union Cent. L. Ins. Co. v. Poettker,* 5 Big. L. & A. Ins. Rep. 449; May, Ins. § 568; Bliss, Life Ins. § 425; Kerr, Ins. 751, 753. Putting an end to any contract gives an immediate right of action for full damages. Plaintiff need not wait for expiration of contract or death. *Hildebrand v. Am. F. A. Co.* 109 Wis. 171; *Howard v. Daly,* 61 N. Y. 362; *Burtis v. Thompson,* 42 N. Y. 246; *Van Werden v. Equitable L. A. Soc.* 99 Iowa, 621; *Dugan v. Anderson,* 36 Md. 567; *Cohen v. New York Mut. L. Ins. Co.* 50 N. Y. 610; *Hochster v. De La Tour,* 2 El. & Bl. 678, 20 Eng. L. & Eq. 157; *Day v. Conn. Gen. L. Ins. Co.* 45 Conn. 480.

For the respondent there was a brief by *Burr W. Jones,* attorney, and *Brown & Kerr,* of counsel, and oral argument by *Mr. Jones.*

CASSODAY, C. J. 1. It is claimed that the demurrer was properly sustained on the ground of defect of parties plaintiff. It appears from the complaint that the plaintiff's husband, who procured the insurance on his own life, is still living, and hence it is claimed that he should have been made a party plaintiff. The contract required the defendant to pay the insurance to the plaintiff in case she should be living at the time of his death. It is alleged that he is in poor health, but, of course, it is possible for him to survive his wife. Her rights in the insurance are to be determined by the contract and sec. 2347, Stats. 1898. Under that section and the contract the plaintiff was to have the whole of such insurance or none of it. If she died before her husband, then the whole of the insurance was to go to "his heirs;" and if she survived her husband, then the whole of it was to go to her. Subject to such contingency, the insurance was the sole and separate property of the plaintiff, free from the control or disposition of her husband. *Canterbury v. N. W. Mut. L. Ins. Co., ante,* p. 169, 102 N. W. 593. If, therefore, the plaintiff has a cause of action, then neither her husband nor his heirs have any interest in such cause of action, and hence are not necessary parties to this action. The husband and wife are not so united in interest as to require that they should be joined as plaintiffs in this action. Sec. 2604, Stats. 1898; *Barnes v. Beloit,* 19 Wis. 93; *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 508, 83 N. W. 851.

2. It is claimed that the demurrer was properly sustained because the plaintiff's husband is still living, and hence that the plaintiff's alleged cause of action had not yet accrued. It is well established that:

"When one party to an executory contract prevents the performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated, and demand whatever damages he has sustained thereby." *Lovell v. St. Louis M. L. Ins. Co.* 111 U. S. 264, 4 Sup. Ct. 390; *Kelley, M. & Co. v. La Crosse C. Co.* 120 Wis. 84, 89, 90, 97 N. W. 674.

The principal controversies have been as to the proper form of action and the measure of damages. In the case at bar the demurrer concedes that the defendant had wrongfully refused to accept further payments of assessments, and had declared that the insurance had lapsed and the certificate of membership become forfeited. It is claimed that, if this is true, still it only gave to the plaintiff a right of action on the policy after the death of her husband. But there are adjudications to the effect that the policy-holder is not limited to such a remedy. Thus it has been held in Connecticut that, where

"a life insurance company refused to receive the premium on one of its policies from a holder on the ground that it had become forfeited by a breach of one of its conditions by the person whose life was insured, . . . there were three courses open to the holder of the policy in the circumstances: (1) He might elect to consider the policy at an end, in which case he could, in a proper action, recover its just value. (2) He might institute an equitable proceeding to have the policy adjudged in force, in which case the question of forfeiture could be determined. (3) He might tender the premium, and wait till the policy became payable by its terms, and then try the question of forfeiture in a proper action on the policy." *Day v. Connecticut G. L. Ins. Co.* 45 Conn. 480.

In the case at bar the beneficiary has elected to consider the policy at an end, and is here seeking to recover its value, as damages for the breach of the contract.

In a Virginia case a husband took out a policy of insurance on his own life for the benefit of his wife, and, in case she died before he did, then for her children, and paid the pre-

miums thereon up to the time of the war. After the war the company repudiated the policy. Then the wife died without bringing any suit, leaving only one child her surviving, and that child brought the action during the life of the assured, for damages for the breach of the contract. Pending that suit the insured died, and it was held, in effect, that after the company repudiated the policy the wife might have sued in her own name for damages for the breach of the contract, or she might have waited, and, if she survived her husband, she might have brought an action on the policy; that as she did not survive, but died prior to her husband, such right of action on her death at once became vested in the child; that the war did not abrogate the policy, but only suspended the same; and that the company's repudiation of the policy after the war excused the insured from making any tender of premiums thereafter. *Clemmitt v. New York L. Ins. Co.* 76 Va. 355; *S. C.* 77 Va. 366. It was there further held that:

"Where breach occurred and suit is brought during insured's life, and he dies before judgment, the value of the policy is the present value, as at the date of the insurance company's repudiation, of the sum assured and payable at the death of the assured, to be diminished, however, at the same date, by the present value of the premiums subsequently accrued, and also by the amount of the premiums previously accrued (which are unpaid), and interest thereon."

It was there strongly intimated that, even if the assured had been "alive at the date of the judgment, with no decrease of health except from efflux of time," still she might have recovered such damages as she had actually sustained. It was there said that "the rule to ascertain the value of a life policy is laid down in *Universal L. Ins. Co. v. Binford,* 76 Va. 103." In that case the company was insolvent, and it was held that the policy-holder was entitled to a sum of money which "would purchase from a solvent company a policy of the same kind, for the same amount, and for the same rate of premium," and that such amount was ascertainable "by treating

the difference between the premiums paid the defendant company and the premiums to be paid to the new insuring company as an annuity for the assured's expectation of life, and calculating its cash value." In the case at bar the company is solvent, and the assured is in poor health and is not insurable.

In Georgia it has been held that, where the company had breached the contract, the holder of the policy was entitled to "recover any damages he may have sustained in consequence thereof." *Alabama G. L. Ins. Co. v. Garmany,* 74 Ga. 51. It has been held in New York that, where the policy-holder is entitled to recover damages for the breach of the contract, the measure of his damages "is the value of the policy destroyed; and in ascertaining this resort may properly be had to tables used in the business of life insurance, showing the average expectancy of life." *People v. Security L. Ins. & A. Co.* 78 N. Y. 114, 125, 126. In a later case in New York it was held:

"That if, at the time of the refusal of the defendant to accept the premiums, the life of the plaintiff's father was still insurable, the measure of his damages was the difference between the then present value of the premiums he would have been compelled to pay during the life of his father under the policy issued by the defendant and the present value of the premiums which he would be compelled to pay under a policy which could then be obtained from another responsible company; that if at that time the life of his father was not insurable, his damages would be the actual value of the policy at the time of the breach, as being a valid and obligatory claim against an entirely responsible company." *Speer v. Phœnix M. L. Ins. Co.* 36 Hun, 322.

In that state it is held that in case of such breach of the company the policy-holder is entitled to recover as damages the value of the policy at the time of the breach. *Farley v. Union M. L. Ins. Co.* 41 Hun, 304; *People v. Empire M. L. Ins. Co.* 92 N. Y. 105. The latest case in that state which has come to our attention, and applicable here, is *Toplitz v.*

Bauer, 161 N. Y. 325, 336, 55 N. E. 1059, 1062, where it was said by the court and held that:

"The insurance company, having thus canceled its obligation, refused to reinstate it. The plaintiffs are entitled to complete indemnity for the loss thus sustained, and the inquiry was, What was the loss in contemplation of law? . . . The reasonable and just rule of damages in such cases would seem to be the cost of replacing the policy on the same terms in a perfectly sound company at the time of the surrender, but the pledgor had then ceased to be an insurable risk under any circumstances existing in the business of insurance; so that the real loss was the face of the policy less what it would cost to carry it by payment of another premium which fell due before the death of the insured." See 2 May, Ins. (4th ed.) § 569.

These New York adjudications seem to indicate the true rule of damages in such cases. Under the allegations of the complaint, which are admitted by the demurrer, the plaintiff is entitled to recover unless she should die before the assured. So, as the case now stands, the complaint states a cause of action.

By the Court.—The order of the circuit court is reversed, and the cause is remanded with direction to overrule the demurrer, and for further proceedings according to law.

SIEBECKER and KERWIN, JJ., took no part.

WELLS, Respondent, vs. SCANLAN and others, Appellants.

January 31—February 21, 1905.

Mortgages: Deed and defeasance: Limitations: Where cause of action accrues.

1. A deed given as security for a loan, and a written defeasance by which the lender agreed to reconvey upon payment of the debt, together constituted a mortgage.

2. The statute (subd. 2, sec. 4221, Stats. 1898) limiting to ten years "an action upon a sealed instrument when the cause of action accrued without this state," does not apply to an action to foreclose a mortgage of land situated in this state, although both parties reside in another state. Such an action, being merely a proceeding against land in this state, is local and not maintainable in the courts of any other state, and hence the cause of action accrues in this state and nowhere else.

APPEAL from a judgment of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Affirmed.*

On March 10, 1891, *Agnes M. Scanlan,* in consideration of a loan of $1,500 either to herself or to her husband, executed her note for that amount, payable at Chicago, Illinois, three months after date, and, as security, deeded to the lender, Andrew S. Work, lands in Dodge county, Wisconsin, and received from Work a written defeasance, agreeing to reconvey upon payment of the debt. Work transferred the note to one J. H. Wheeler, who had negotiated the loan. He recovered judgment thereon against *Agnes M. Scanlan* in Chicago on October 19, 1891. In November, 1891, one Hedenberg paid the amount of that judgment in purchase thereof, as now claimed, but received no formal assignment of it until June 22, 1898, when Wheeler executed and delivered such assignment. On the 7th of July, 1900, Wheeler made another formal assignment of the judgment to the plaintiff, *Wells,* and on the same day Hedenberg also made an assignment of it to her, and Work made a quitclaim to her of the Dodge county lands. This action was brought on substantially the foregoing facts, with a prayer of strict foreclosure of the interest of *Agnes M. Scanlan* and other defendants claiming some rights under her, but praying also general and equitable relief.

The defense interposed was that the money was borrowed by *Mrs. Scanlan* for the benefit of Hedenberg, who agreed with her to pay the debt; hence that his payment of the judgment to Wheeler canceled the debt, as also the mortgage

interest held under her deed. The answer also set up expiration of ten years, and bar by limitation, under sec. 4221, Stats. 1898. *Agnes M. Scanlan* died before the trial, and there was no evidence offered of the alleged primary indebtedness of Hedenberg.

The court held that the transaction constituted a mortgage; that Hedenberg's action amounted to a purchase of the debt, and not a payment; and that the statute of limitations was not a bar to the action—whereupon it rendered judgment for foreclosure and sale, in the usual statutory form, without any direction for a personal judgment for deficiency. From this judgment the defendants appeal.

The cause was submitted for the appellants on the brief of *George W. Sloan* and *K. C. Lewis,* and for the respondent on that of *John C. Healy,* attorney, and *W. E. Keeley,* of counsel.

DODGE, J. Both parties agree that the writings between *Mrs. Scanlan* and Work constituted a mortgage, the concession being fully justified by the authorities in this state. *Brinkman v. Jones,* 44 Wis. 498, 514; *Cumps v. Kiyo,* 104 Wis. 656, 659, 80 N. W. 937; *Beebe v. Wis. M. L. Co.* 117 Wis. 328, 332, 93 N. W. 1103.

The defense of payment resulting from Hedenberg's alleged primary liability as between him and Scanlan is, owing, perhaps, to the death of *Mrs. Scanlan,* wholly unsupported by evidence; and the finding that the transaction between Hedenberg and Wheeler was that of purchase of the judgment is supported both by the documentary and oral evidence. There is full proof of the transfer of the debt evidenced by the judgment, and also the formal title to or lien upon the land, to plaintiff.

The only remaining defense is subd. 2, sec. 4221, Stats. 1898, limiting to ten years "an action upon a sealed instrument when the cause of action accrued without this state."

Appellant argues that this action accrued in the state of Illinois, because both plaintiff and defendant there resided. That position he supports by certain authorities, some of which do in fact contain the declaration that a cause of action arises in the state where the debtor resides, and nowhere else; but those decisions are all with reference to personal liabilities, to actions on which the presence of the debtor is essential. A suit to foreclose a mortgage or enforce other lien upon land is distinct from the action at law to recover the debt. *Duecker v. Goeres,* 104 Wis. 29, 37, 80 N. W. 91. The rendition of a personal judgment against the debtor may or may not be joined with the suit to enforce the lien by virtue of our statute, and perhaps by virtue of the general power of a court of equity to render complete justice between the parties, but it is a wholly nonessential part of the suit. Thus it has been definitely settled in Wisconsin that even the complete destruction of the debt by statute of limitation has no effect upon the right to maintain an equitable suit to enforce the mortgage. *Wiswell v. Baxter,* 20 Wis. 680; *Whipple v. Barnes,* 21 Wis. 327; *Duecker v. Goeres, supra.* Hence there can be no doubt that this action is what it purports on its face to be—a mere proceeding against the real estate in Wisconsin. Such an action, of course, is local, and could not be maintained in the courts of any other state. They would have no jurisdiction of the subject matter, for, the proceeding being substantially *in rem,* the *res* would not be within their reach. No adjudication they could make could act upon it. *Ellenwood v. Marietta C. Co.* 158 U. S. 105, 15 Sup. Ct. 771; *Swift v. James,* 50 Wis. 540, 7 N. W. 656; Story, Confl. Laws, secs. 539, 551.

It is surely absurd to assert that a cause of action accrues in a state where there is no court which can take jurisdiction of its subject matter. The very reasoning of the cases cited by appellant, insisting upon the accrual of the action at the place of defendant's residence, base such insistence upon the

necessity of his presence in order to give the court jurisdiction. *Luce v. Clarke,* 49 Minn. 356, 51 N. W. 1162; *Humphrey v. Cole,* 14 Ill. App. 56, 62; *Hyman v. McVeigh,* 10 Chi. Leg. News, 157; *O'Donnell v. Lewis,* 104 Ill. App. 198, 201. Thus in the Illinois cases it is said a cause of action has arisen in another state "when jurisdiction existed in the courts of another state to adjudicate between the parties upon the particular cause of action." The Minnesota court declares that the cause of action on a personal debt arises only where and when there concur "the existence of facts constituting a cause of action suable in the courts of that state, and the presence in it of the defendant." Then only is there "the opportunity to commence an action in that state." Wherever courts have had before them the subject of an action *in rem,* or directly affecting real estate, they have held that the cause of action has no existence except within the jurisdiction where the land is. *Anderson v. Baxter,* 4 Oreg. 105, 111; *Bradley v. Cole,* 67 Iowa, 650, 25 N. W. 849. We cannot doubt the correctness of this view, nor hesitate over the conclusion that the cause of action now presented accrued in the state of Wisconsin, and nowhere else. For that action the presence of the land was necessary to the jurisdiction of any court over the subject matter, while the presence of the defendant was in no wise essential, for the court could act upon the *res,* wherever the defendant might be, by means of substituted service of process. Stats. 1898, sec. 2639, subd. 4; *Moyer v. Koontz,* 103 Wis. 22, 79 N. W. 50; *Pennoyer v. Neff,* 95 U. S. 714; *Arndt v. Griggs,* 134 U. S. 316, 10 Sup. Ct. 557.

This conclusion is, of course, fatal to the contention that the cause of action accrued outside of this state, and precludes application of the statute pleaded. It results that no defense was established, and the judgment of foreclosure and sale was proper.

By the Court.—Judgment affirmed.

O'NIEL, Appellant, vs. WM. B. H. KERR COMPANY, Respondent.

January 31—February 21, 1905.

Assignment of fund not in existence: Equitable lien.

A writing given by H. to K., authorizing one M. to pay to K. all sums to become due upon subsequent sales of milk by H. to M.—there being an expectation that such sales would be made, but no binding contract between H. and M. to that effect—did not pass any legal interest in any such sum not actually paid over to K., or give him any equitable lien thereon, as against a subsequent garnishment of M. by another creditor of K.

APPEAL from a judgment of the circuit court for Washington county: JAMES J. DICK, Circuit Judge. *Reversed.*

The plaintiff brought this action on a note given by the principal defendant, Heinrich Helmke, and recovered judgment thereon, and instituted this garnishment action to aid in the collection of the amount due on such judgment on the 2d day of January, 1902. The garnishee defendant, Michael Murphy, answered, alleging that at the time he was served with the summons herein there was a balance due from him on account of milk delivered by defendant at his cheese factory between March 22, 1901, and January 2, 1902, in the sum of $168.15; that the *Wm. B. H. Kerr Company,* a corporation, claimed this balance under a writing executed by Helmke in its favor, and directed to the garnishee, Murphy, and received and accepted by him at about the time it is dated. The writing is as follows:

"North Lake, Wis., March 29, 1901.

"For the purpose of obtaining credit from the *Wm. B. H. Kerr Company,* I hereby authorize you to pay said Wm. B. H. Kerr all my part of the milk delivered to your factory.

"To Mike Murphy. HEINRICH HELMKE."

It appeared that the writing was executed for the purpose of obtaining credit for goods and merchandise to be purchased

from the *Kerr Company,* and that the defendant Helmke purchased goods from the company between the date of the order and the service of the summons aggregating in amount a sum largely in excess of the total amount due for all the milk he delivered to Murphy during that time. At different times between August 1, 1901, and January 2, 1902, Murphy, out of what was due Helmke for milk delivered at the factory, had paid the *Kerr Company* a total of $135. The court found that these payments were made under the arrangement between Helmke, the *Kerr Company,* and Murphy. It appeared that no contract existed between Helmke and Murphy whereby Helmke agreed to deliver his milk to Murphy for any future period, nor did it appear that Murphy was obligated to receive his milk for any period after March 29, 1901. Upon the application of the defendant Murphy the sum of $168.15 was paid into court. The *Kerr Company* was made a party defendant to the action, who interpleaded, claiming the amount paid into court under the order of March 29th, and the garnishee action and all further proceedings as to the garnishee were discontinued and dismissed. The court awarded judgment in favor of the impleaded defendant, the *Kerr Company,* holding that the order was an effective agreement to transfer or create a lien on all of Helmke's interest in the money due him for milk delivered to Murphy after the order, and covering the proceeds in Murphy's hands when garnishment proceedings were commenced. This is an appeal from such judgment.

For the appellant there was a brief by *Sawyer & Sawyer,* and oral argument by *E. W. Sawyer.*

For the respondent there was a brief by *Frame & Blackstone,* and oral argument by *H. J. Frame.*

SIEBECKER, J. The controversy between the parties is over the legal effect of the order of defendant Helmke, whereby he authorized the garnishee, Murphy, to pay the *Kerr Company*

all the money that might become due for milk delivered thereafter to Murphy's factory. Does this order operate either as an assignment of, or create an equitable lien on, the proceeds of the milk delivered to Murphy after the order was given? The court found that since this order was given by Helmke to obtain credit from the *Kerr Company* for the purchase of goods and merchandise at their store, and such credit was extended to him, and payments were made on this account out of the amount due for milk delivered after the written order had been given, it followed that the *Kerr Company* had a right to the amount in the garnishee's possession when the action was commenced.

The legal effect of transactions like this has often been discussed and considered by the courts, resulting in conflicting conclusions upon the subject. There is practical unanimity of opinion that, in law, there is no transfer of title or interest to such property; but the courts are not agreed upon the question whether such an agreement creates a lien of an equitable character attaching to and bringing the property within the terms of the agreement upon the property coming into existence and possession of the party attempting to transfer it. The case, however, is not one of first impression before this court. It was presented in the early case of *Chynoweth v. Tenney,* 10 Wis. 397, and a number of subsequent cases. Mr. Justice PAINE, in delivering the opinion of the court in that case, observed:

"The effect to be given to conveyances which purport to grant property to be thereafter acquired by the grantor has of late occupied the attention of courts to a considerable extent, and does not seem to be entirely settled. The maxim of the common law that 'a man cannot grant or charge that which he hath not,' if applied to it without qualification, would readily determine it."

After an examination of the cases the court declares that a conveyance of after-acquired property is "inoperative to

transfer the property," as between the parties, "without some new act on the part of the grantor ratifying it after he had acquired it." Id. 401. This doctrine was applied by the court to that case, which dealt with a chattel mortgage transfer. It is recognized, however, that it applies with equal force to sales of and charges upon personal property. The ruling in this and subsequent cases is upon the ground that a party must have an existing vested interest in the property sought to be conveyed, to give the transfer effect in the law, and that a mere possibility or expectancy of acquiring property, "not coupled with an interest, is insufficient." It is well settled that a potential interest in property is sufficient to support such a transfer. This principle is illustrated in the case of *Low v. Pew,* 108 Mass. 347, wherein the court applied it to assignments of future wages or earnings, holding that an assignment of future wages, where there is no contract for service, is invalid; on the other hand, if a person is under contract for service, he may assign his future earnings growing out of such contract. "The distinction between the cases is that in the former the future earnings are a mere possibility, while in the latter the possibility of future earnings is coupled with an interest, and the right to them, though contingent and liable to be defeated, is a vested right."

Under the facts of this case, Helmke was under no obligation to deliver milk to Murphy after the date of the order. The expectation that he would do so may have existed, but was coupled with no vested interest. This made it a mere possibility, and created no actual or potential interest in any of the proceeds of the milk he afterwards delivered; thus rendering the order ineffectual as a legal transfer. *Farmers' L. & T. Co. v. Commercial Bank,* 11 Wis. 207; *Single v. Phelps,* 20 Wis. 398; *Hunter v. Bosworth,* 43 Wis. 583; *Lamson v. Moffat,* 61 Wis. 153, 21 N. W. 62; *Merchants' & M. S. Bank v. Lovejoy,* 84 Wis. 601, 55 N. W. 108; *Huling v. Cabell,* 9 W. Va. 522; *Cook v. Corthell,* 11 R. I. 482.

It is argued that, if the order was not a transfer of such proceeds, it should be given legal efficacy in the nature of an executory contract creating a lien on this fund, which authorized the *Kerr Company* to take and hold the money as against the defendant and his creditors. This proposition was also considered and passed upon in the *Chynoweth Case,* and it was held that such an attempted transfer of after-acquired property is not effectual to create a lien in equity. *Merchants' & M. S. Bank v. Lovejoy, supra; Lamson v. Moffat, supra; Brown v. Neilson,* 61 Neb. 765, 86 N. W. 498. The logical deduction to be made from the authorities upon the subject in this court is that the agreement under which the *Kerr Company* asserts its right to the money paid into court does not pass any legal interest, or give any equitable lien on the fund. The only right the *Kerr Company* acquired under the order was a license to obtain the money due Helmke while it was in Murphy's possession, and that when it had taken such possession it was with the consent of Helmke, and its title became good to the amount taken (*Chynoweth Case,* 10 Wis. 407), but that it acquired no right to the fund while in Murphy's possession as against the plaintiff, who now claims the proceeds as an attaching creditor of the defendant Helmke. The plaintiff was entitled to judgment directing that the money now in court be paid to him in satisfaction of his judgment against Helmke.

By the Court.—The judgment is reversed, and the cause is remanded with directions that the plaintiff be awarded judgment for the sum paid into court by the garnishee.

SHIRLEY, Respondent, vs. CITY OF WAUKESHA, Appellant.

January 31—February 21, 1905.

Municipal corporations: Special assessments for improvements: Voluntary payment: Reassessment.

1. In proceedings for the improvement of a street under a city charter, the assessment of benefits having been confirmed upon due notice to all persons interested, and all subsequent steps having been taken in accordance with the charter and upon due notice, payment of the assessment against an abutting lot, made by the owner's agent in charge thereof without protest or objection, was a voluntary payment, and the money paid cannot be recovered back.
2. A lotowner who has voluntarily paid an assessment of the benefits from a street improvement cannot thereafter maintain an action to set aside such assessment and for a reassessment.

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Reversed.*

At the times mentioned in the complaint defendant was a municipal corporation organized and existing under the general city charter law of the state of Wisconsin, and plaintiff was the owner of the south fifty-three feet of lot 6, block 6, Cutler's addition to the city of *Waukesha.* In May, 1900, the common council of defendant by resolution duly authorized the grading and paving of West avenue in said city, upon which avenue plaintiff's lot abuts. The board of public works, pursuant to said resolution, proceeded to assess the benefits and damages to the abutting property occasioned by the improvement, and assessed $120 benefits against plaintiff's property, and on December 3, 1900, duly filed its report with the city clerk of defendant city, purporting to be in accordance with law in such cases made and provided as to benefits and damages to the property owners on said West avenue by reason of the improvement, which report showed that the property, including that owned by the plaintiff, was not dam-

aged by the improvement. Due notice was given to all property owners, as required by law, of the making of said assessment of benefits and damages, and of the filing of said report, and of the time and place for review and hearing objections to such assessment and report, and upon such hearing said report was confirmed. Afterwards, and in accordance with sec. 925—191, Stats. 1898, due proceedings were had and notice given to all property owners that the work had been completed, and unless they paid their assessment improvement bonds would be issued. After the work of said improvement had been duly approved the contractor doing the same received a certificate therefor issued in July, 1901, as to the parcel of land described in the plaintiff's complaint.

On July 16, 1903, this action was brought to set aside the assessment against plaintiff's property and for reassessment of benefits and damages. Defendant demurred for want of facts sufficient to constitute a cause of action, which was overruled. Defendant answered, setting up, among other things, that one J. K. Randle was managing agent of plaintiff and had charge of her property and full knowledge of the acts and things done by defendant in relation to the improvement, and that plaintiff, through her agent, voluntarily paid the assessment for said improvement.

The court below found that the common council duly directed the board of public works to make the improvement; that the property of plaintiff was assessed as to benefits in the sum of $120; that prior to the commencement of this action plaintiff paid to the city clerk of defendant, through her agent, the amount of the benefits assessed by reason of said improvement; and further found that the assessment of benefits and damages by reason of the improvement in front of plaintiff's property was arbitrary and should be set aside, and a reassessment of benefits and damages as to plaintiff's property had, and directed judgment, with costs. Judgment was entered accordingly, from which this appeal was taken.

For the appellant there was a brief by *Henry Lockney,* attorney, and *H. J. Frame,* of counsel, and oral argument by *Mr. Frame.*

For the respondent there was a brief by *Ryan, Merton & Newbury,* and oral argument by *T. E. Ryan.*

KERWIN, J. Upon the undisputed evidence in this case the payment of assessment against plaintiff's property must be regarded as a voluntary payment with full knowledge of the facts upon which such assessment was made. It appears that the board of public works proceeded under the charter to make the improvement in question by authority of the common council, and filed its report as required by law, which showed assessment of benefits against plaintiff's property. Subsequent proceedings were had in accordance with the charter, and notice duly given to all parties interested of the meeting of the board to hear objections to the assessment of benefits, and upon due notice and hearing the assessment of benefits, including the assessment against plaintiff's property, was confirmed. The report of the board of public works and proceedings thereon were open to inspection by plaintiff and all parties interested. The street was improved, and the certificate provided for by the charter of defendant city issued to the contractor who performed the work. Notice was given to property owners that, unless they paid such certificates, bonds would be issued at the expiration of thirty days. The agent of plaintiff, who had charge of her property, paid the assessment for plaintiff without any protest or objection. No evidence of want of notice was offered upon the trial. Upon the undisputed facts the plaintiff must be deemed to have had notice of all the proceedings in making the improvement and assessing the benefits and damages.

In the light of the evidence in this case we must hold that plaintiff paid the assessment in question voluntarily, and should be charged with knowledge of the proceedings of the

board of public works. *Babcock v. Fond du Lac,* 58 Wis. 230, 16 N. W. 625. It is well settled that where one voluntarily pays money upon a claim with full knowledge of the facts upon which such claim is founded he cannot recover the money back on the ground that such claim was unenforceable. 22 Am. & Eng. Ency. of Law (2d ed.) 609, and cases cited; *Gage v. Allen,* 89 Wis. 98, 61 N. W. 361; *Custin v. Viroqua,* 67 Wis. 314, 30 N. W. 515. And this general doctrine applies to the payment of taxes. Hence taxes voluntarily paid, in the absence of fraud, misrepresentations, duress, or coercion, cannot be recovered back. *Little v. Bowers,* 134 U. S. 547, 10 Sup. Ct. 620; *Railroad Co. v. Comm'rs,* 98 U. S. 541; *Babcock v. Fond du Lac, supra; Rutledge v. Price Co.* 66 Wis. 35, 27 N. W. 819; *Powell v. St. Croix Co.* 46 Wis. 210, 50 N. W. 1013.

From this well-settled doctrine it is clear that the plaintiff could not recover in an action at law the money paid to the city clerk of defendant city upon the assessment against her property. It is equally clear that she cannot maintain the present action for reassessment, which is based upon the theory of reducing or extinguishing the assessment of benefits, since she could not profit by such reduction, having voluntarily paid the whole amount of the assessment. The litigation, therefore, in any event, would prove fruitless, and the plaintiff has no cause of action.

From the view we have taken of this case it becomes unnecessary to consider other questions discussed by counsel.

By the Court.—The judgment of the court below is reversed, and the cause remanded with directions to dismiss the complaint.

TIBORSKY, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

January 31—February 21, 1905.

Railroads: Negligence: Presumption from accident: Truck left on sidewalk: Court and jury: Evidence: Res gestæ.

1. Negligence of the railway company is not to be presumed, under the rule of *res ipsa loquitur*, from the mere fact that one walking at night on the sidewalk adjacent to a station platform was injured by falling over a truck belonging to the company, which had been left on the walk.
2. Upon the evidence in such a case—tending to show, among other things, that the truck was customarily used by the company's employees at and near the place of the accident, and not showing that any one else had had anything to do with it—it is *held* that the question of the company's negligence was one for the jury.
3. The fact that, in such case, the injured person went, immediately after the accident, into the depot and told the telegraph operator what had happened, did not make the reply of such operator admissible in evidence as part of the *res gestæ*.

APPEAL from a judgment of the circuit court for Washington county: JAMES J. DICK, Circuit Judge. *Reversed.*

This is an action to recover damages for personal injuries sustained by the plaintiff by reason of having stumbled over a truck belonging to the defendant, and alleged to have been negligently and wrongfully left upon the public sidewalk in front of the defendant's depot platform on the evening of December 23, 1902.

The answer admits the allegations of the complaint to the effect that at the times therein mentioned the plaintiff was a resident of the city of Hartford, in this state, and conducting a shoe store therein; that the defendant corporation owned and operated a railroad running through that city during all of such times; that the principal business street in that city extends from the north to the south, and is known as Main street, with sidewalks constructed and maintained on each

side thereof by the city for the accommodation of the public traveling on foot; that the defendant's railroad tracks run east and west across that street at right angles with it; that the defendant's passenger station is located on its right of way immediately south of said railroad tracks and west of said Main street; that the depot platform used in connection with said depot and said tracks also extends from said depot east and up to the sidewalk on the west side of Main street; and that the agents and employees of the defendant in the discharge of their usual and required duties were accustomed to use trucks with which to carry baggage, express matter, and other material over and upon said platform and sidewalk.

The answer specifically denied the other allegations of the complaint to the effect that December 23, 1902, the defendant's agents and servants unlawfully, wrongfully, negligently, and carelessly obstructed said public sidewalk at the east end of said platform by wrongfully, negligently, and carelessly placing upon and leaving thereon one of said trucks so being used and belonging to the defendant, and thus obstructing the sidewalk and imperiling the safety of travelers thereon at the time in question; that about 8 o'clock on that evening the plaintiff, while passing along upon that sidewalk on the west side of Main street and at the east end of said railway passenger station and platform, in the exercise of due care, was suddenly tripped by said truck, and fell over the same with great force, and was badly injured; that the night was dark and foggy and there were no lights at or near where the truck was so located at the time; that by reason of such injury the plaintiff had suffered great and permanent damage, for which he demands judgment.

The issues so joined were tried by the court and the jury, and at the close of the testimony on the part of the plaintiff the court granted a nonsuit, and from the judgment entered thereon in favor of the defendant the plaintiff appeals.

For the appellant there was a brief by *J. C. Russell* and *S. S. Barney,* and oral argument by *John M. Barney.*

For the respondent the cause was submitted on a brief by *H. H. Field* and *C. H. Van Alstine.*

CASSODAY, C. J. In addition to the facts alleged in the complaint and expressly admitted in the answer, as indicated in the foregoing statement, there is evidence tending to prove that the platform on the east side of the depot extended to the sidewalk on the west side of the street; that such sidewalk was about five feet wide, and came up flush with the depot platform, and was of the same width and a continuation of the street sidewalk immediately north and south of it. Passengers were in the habit of taking their baggage up to that sidewalk and shoving it onto the platform, where it would be received by the baggageman. The regular train reached the depot that evening on schedule time, 6:30 p. m., and departed at 6:38 p. m. The truck in question was about four and one half feet long, two feet wide, and from eight to ten inches high when lying flat on the sidewalk. At the lower part there was a rim of steel or iron that projected out, about half an inch thick and six inches wide on the slant, with a blunt edge to shove under the trunk, and was as long as the truck was wide. It had two legs of iron or steel. When the truck was lying down, the rim with the blunt edge naturally projected forward, and would be about sixteen inches from the ground. The truck belonged to the defendant, and was used to wheel trunks from where they were unloaded off the cars to the dray wagon, and in doing so would pass over the sidewalk in question. The baggageman left the depot that evening just after the train left. It was his duty to handle the baggage, and he received sixteen pieces of baggage on the day in question, but he did not know anything about the amount of baggage in the baggage room that evening.

The plaintiff was over forty years of age at the time of the

accident. Between 7 and 8 o'clock on the evening in question he started alone from his store to go up to the Catholic schoolhouse to attend church. It was so dark that he could not see anything on the walk in front of him, and it was windy. When he came by the depot, he fell over the truck standing on the Main street sidewalk, at the end of the depot platform. At first he did not know what it was that he had fallen over. It hit him in the leg—in the shins. It was about thirty feet from the depot door. He got up and went into the depot, and there found O'Neil, the night telegraph operator, and told him what had happened. They went out together, and found the truck on the sidewalk. O'Neil testified that he took the truck and put it in the baggage room, and that he did not know whether the door of that room was locked or unlocked; that it was not supposed to be unlocked. The evidence mentioned was admitted without objection.

1. Error is assigned because the court took the case from the jury and granted a nonsuit. In support of such contention counsel cite a class of cases where the mere proof of the accident was held to create a presumption of negligence. *Cummings v. National F. Co.* 60 Wis. 603, 18 N. W. 742, 20 N. W. 665; *Carroll v. C., B. & N. R. Co.* 99 Wis. 399, 403, 75 N. W. 176. But such rule has its qualifications, as has repeatedly been pointed out by this court. *Spille v. Wis. B. & I. Co.* 105 Wis. 340, 349, 81 N. W. 397; *Musbach v. Wis. C. Co.* 108 Wis. 57, 67, 84 N. W. 36; *Beyersdorf v. Cream City S. & D. Co.* 109 Wis. 456, 463, 84 N. W. 860. It is enough to say here, as to that question, that the rule mentioned is not applicable to the case at bar.

But it does not follow that the case was properly taken from the jury. Of course, the burden of proving actionable negligence was on the plaintiff. It is true, moreover, that the facts in this case are undisputed. It has often been said that—

"Negligence, in one sense, is a quality attaching to acts dependent upon and arising out of the duties and relations of

the parties concerned, and is as much a fact to be found by the jury as the alleged acts to which it attaches by virtue of such duties and relations." *Townley v. C., M. & St. P. R. Co.* 53 Wis. 633, 11 N. W. 55; *Kaples v. Orth,* 61 Wis. 533, 21 N. W. 633; *Hart v. W. S. R. Co.* 86 Wis. 489, 490, 57 N. W. 91.

It is not a conclusion to be testified to by witnesses, but an inference to be deduced from the facts and circumstances disclosed by the evidence. When the standard of duty is a shifting one, it is generally a question for the jury. Id.. It is only when the facts and circumstances are not ambiguous, and there is no room for two honest and apparently reasonable conclusions, that the court is justified in taking the question from the jury.

"When such facts and circumstances, though undisputed, are ambiguous and of such a nature that reasonable men, unaffected by bias or prejudice, may disagree as to the inference or conclusion to be drawn from them, then the case should be submitted to the jury." *Kaples v. Orth,* 61 Wis. 533, 21 N. W. 634.

Here the truck was the property of the defendant. It was customarily used by the defendant's employees at and near the place where it was found at the time of the accident. That place was a public sidewalk upon which people on foot were liable to pass at night or day, and had the legal right to pass. It was a dark night. In the absence of knowledge to the contrary, the plaintiff had the right to assume that the sidewalk was a safe place upon which to walk. The presence of such a truck upon the walk might render it unsafe for travelers on foot under the circumstances disclosed in the evidence. Counsel for the defendant say there was no testimony as to who left the truck upon the sidewalk that evening. There is some evidence tending to prove that the truck was customarily used by the defendant's agents and employees at and near the place of the accident, and there is no evidence tending to prove that any one not in the employ of the defendant

had anything to do with the truck. In that respect it differs from *Stimson v. M., L. S. & W. R. Co.* 75 Wis. 381, 383, 44 N. W. 748. After careful consideration we are constrained to hold that the evidence was sufficient to take the case to the jury.

2. After the accident the plaintiff went into the depot, and told the night telegraph operator what had happened, as stated above. Error is assigned because the court excluded the reply of the night telegraph operator. It is claimed that such statements were admissible as a part of the *res gestæ,* and counsel cite in support of such contention, among other cases, *Hooker v. C., M. & St. P. R. Co.* 76 Wis. 542, 547, 44 N. W. 1085; *Hermes v. C. & N. W. R. Co.* 80 Wis. 590, 592, 50 N. W. 584; *Christianson v. Pioneer F. Co.* 92 Wis. 649, 653, 66 N. W. 699; *Bliss v. State,* 117 Wis. 596, 94 N. W. 325; *Hupfer v. National D. Co.* 119 Wis. 417, 96 N. W. 809. As stated by way of quotation from a standard text-writer in one of these cases:

"The idea of the *res gestæ* presupposes a main fact or principal transaction, and the *res gestæ* mean the circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character." *Hermes v. C. & N. W. R. Co.* 80 Wis. 592, 50 N. W. 585.

The declarations held to be admissible as a part of the *res gestæ* in these cases were in some way connected with the main fact or transaction under consideration, and served to illustrate its character. 1 Greenl. Ev. (15th ed.) § 108. There is no dispute in the case at bar as to the plaintiff's injury, nor as to the manner in which it occurred. The main fact here in controversy is as to whether the truck was left upon the sidewalk by the negligence of the defendant. There is no evidence tending to prove that the night telegraph operator was an actor or participant in that transaction, much less that his declarations sought to be proved were a part of the *res gestæ.* There is no pretense that such declarations

were admissible merely because the night telegraph operator was in the employ of the defendant. No such claim could be maintained. 1 Greenl. Ev. (15th ed.) §§ 113, 114; *Sidney S. F. Co. v. Warsaw,* 122 Pa. St. 494, 500, 15 Atl. 881; *Dorne v. Southwork Mfg. Co.* 11 Cush. 205; *Fogg v. Child,* 13 Barb. 246. We must hold that there was no error in excluding such declarations.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

HAMMACHER. Appellant, vs. TOWN OF NEW BERLIN, Respondent.

January 31—February 21, 1905.

Highways: Duty of town: Injury to pedestrian on footpath: Absence of railing at culvert: Proximate cause: Judgment non obstante.

1. Towns are not required to keep country roads in suitable condition for travel for their whole width, nor to build sidewalks thereon.
2. One who, while walking at night in a footpath, not prepared for public travel, beside a country road with which he was familiar, failed to follow such path into the traveled roadway and over a culvert, and so walked into a ditch and was injured, cannot recover from the town for such injury.
3. The absence of any railing or guard to prevent a traveler on the prepared roadway from falling off the end of the culvert, is immaterial in such a case, since such a railing would not have prevented the accident.
4. Where on the undisputed facts a verdict for defendant should have been directed, it is proper to grant judgment for defendant notwithstanding the verdict.

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Affirmed.*

This is an action for personal injuries received by the plaintiff while walking on a highway in the defendant town

April 16, 1901, at about half past 8 o'clock p. m. The facts were not in dispute. The highway in question runs east and west, and is a well-traveled country road, fifty feet in width. There is a smooth, graveled roadway in the center, fifteen feet or more in width. A culvert, made of a round drain tile, two feet in diameter, and laid at a depth of three and one half feet below the surface, crossed the traveled roadway nearly at right angles, for the purpose of draining surface water from the higher lands south of the highway to lower lands upon the north. The pipe in question was about twenty feet long, and emptied into an open ditch at the north end, which ditch extended northward across the remainder of the highway. There was no railing at the north end of the culvert nor at the sides of the ditch. The plaintiff lived about 300 feet west of the culvert, on the north side of the road, and was well acquainted with the highway and the culvert. About 400 feet east of the culvert, on the north side of the road, was the store of one Ingersoll. There was no prepared footway on either side of the highway, but there was a narrow footpath made by pedestrians on the north side, running from the Ingersoll store to a point about eight feet east of the culvert, at which place it curved to the south and came up to the traveled road, into which it merged. The plaintiff testified that the evening in question was very dark; that he left the Ingersoll store, and was going home, and walked along this footpath; that he did not notice the turn in the path, and walked on and fell into the ditch just about a foot north of the culvert, and fractured the kneecap of his left leg.

The jury rendered the following special verdict:

"(1) Was the plaintiff injured as claimed at the place alleged in the complaint? *A.* Yes. (2) Was the highway in question, at the time and place of the plaintiff's said injury, in such condition that an injury to an ordinarily prudent traveler thereon would be the natural and probable result? *A.* Yes. (3) If you answer the second question 'Yes,' then ought such condition of the highway in question reasonably

to have been foreseen and anticipated by reasonably prudent officers of the defendant town in the discharge of their duties as such officers? *A.* Yes. (4) Did the want of ordinary care on the part of the plaintiff contribute to produce the injury he received? *A.* No. (5) What sum will compensate the plaintiff for his said injury; that is, In what sum do you assess his damages for medical and surgical attention and services, medicine, care and nursing rendered him, which was sustained by reason of said injury? *A.* $200. In what sum of money do you assess the damages of the plaintiff for the earnings which he failed to earn on account of the said injury? *A.* $500. In what sum do you assess the plaintiff's damage for the bodily and mental pain, suffering, and disability which he has sustained, resulting from the said injury? *A.* $800. In what sum do you assess the plaintiff's damages for the bodily and mental pain, suffering, and disability which will result, and which the plaintiff sustained, from said injury? *A.* $400. In all, at what sum do you assess the plaintiff's damages? *A.* $1,900."

The plaintiff moved for judgment upon the verdict, and the defendant moved for judgment *non obstante,* and also moved to change the answers of the special verdict. The court changed the answers to the second and third questions from "Yes" to "No," and the answer to the fourth question from "No" to "Yes," and also changed the finding as to damages so that the total damages were fixed at $951.25, and entered judgment for the defendant, from which the plaintiff appeals.

For the appellant the cause was submitted on a brief by *P. G. Lewis.*

For the respondent there was a brief by *Ryan, Merton & Newbury,* and oral argument by *E. Merton.* They argued, among other things, that if the usual traveled way of a highway is reasonably open and in safe condition, and the traveler is injured because he changes to, or deems it more judicious to take, a side path, which proves unsafe, he cannot recover. *Burr v. Plymouth,* 48 Conn. 460, 472; *Ozier v. Hinesburgh,* 44 Vt. 220; *Massey v. Columbus,* 75 Ga. 658; *Zettler v. Atlanta,* 66 Ga. 195; *Sykes v. Pawlet,* 43 Vt. 446; *O'Laughlin*

v. Dubuque, 42 Iowa, 539; *Alline v. Le Mars,* 71 Iowa, 654; *Harwood v. Oakham,* 152 Mass. 421. If one, for his own convenience and without necessity, drives outside of the limits of a highway, and is injured there by reason of an excavation, he cannot recover against the municipality as for a defect in the highway. *Biggs v. Huntington,* 32 W. Va. 55; *Fitzgerald v. Berlin,* 64 Wis. 203.

WINSLOW, J. The highway in question was a country road. Towns are not required to keep such roads in suitable condition for travel for their whole width, nor are they required to build sidewalks thereon. Such a requirement would involve a greater expense, both for the town and for adjoining landowners, than has been thought reasonable as yet. Possibly the time may come when it will be deemed proper to require sidewalks upon such highways, but that time is not yet. The town has performed its duty if it properly grades and prepares a part of the highway of reasonable width, and keeps the same in a suitable condition for the use of passengers either on foot or in a conveyance. *Kelley v. Fond du Lac,* 31 Wis. 179. It is true that, if it leaves an unguarded excavation in such close proximity to the traveled and prepared track that passengers using such track are in danger of falling therein while exercising ordinary care, it fails in its duty. So, in the present case, if the plaintiff had been using the traveled track, and stepped off from the end of the culvert, probably there would have been a question for the jury whether the lack of a rail or guard constituted negligence, and also whether the plaintiff was exercising due care in his traveling. But that was not this case. It is undisputed that the plaintiff was very familiar with the road and with its condition at this point. He was knowingly using a part of the highway which had not been prepared for public travel. In so doing he walked into the ditch. No railing or guard designed for the purpose of protecting persons traveling on the

prepared way from the danger of falling off the end of the culvert would have prevented the plaintiff from falling into the ditch. Upon the undisputed facts, therefore, he was not entitled to recover, and a verdict for the defendant should have been directed. Failing in this, the court properly granted judgment for the defendant notwithstanding the verdict. *Muench v. Heinemann,* 119 Wis. 441, 96 N. W. 800.

By the Court.—Judgment affirmed.

GROTJAN, Appellant, vs. RICE, Respondent.

January 31—February 21, 1905.

Implied contract to pay for services: Minor: Emancipation: Evidence: Instructions to jury: Material and immaterial errors.

1. In an action upon implied contract to recover for services of plaintiff while a minor living with defendant, the admission of evidence as to whether or not plaintiff was treated by defendant as a servant for hire was not error. The decision of the trial court as to the competency of such evidence is not to be disturbed unless manifestly wrong.
2. A question, asked on cross-examination of plaintiff's father, as to whether he had not stated that he was anxious to get the boy (who wished to study medicine) to the defendant's (who was a physician), because he would learn more than he would in school, is *held* immaterial, but, it having been answered in the negative, plaintiff was not prejudiced.
3. Evidence that plaintiff's father had advised him to make himself useful while at the defendant's place, as the latter did not like lazy persons, is *held* immaterial, and its admission with a suggestion that it had a bearing on the question whether plaintiff had been emancipated, was an error prejudicial to him.
4. Statements by plaintiff's father to third persons as to his relations with his son, not made in the presence of either of the parties, and not properly offered to impeach the father, were incompetent.
5. An instruction that by a "preponderance of the evidence" is meant "the evidence which satisfies and convinces your minds

and judgments," is *held* erroneous. That term should properly be defined, in effect, as outweighing in convincing force the evidence on the other side.

6. An instruction that if plaintiff was the owner of his own time during the period of the alleged services he was entitled to recover if the jury found he had a cause of action, otherwise not,—is *held* correct so far as it went; and the omission to explain what circumstances would give rise to a cause of action was not fatal error, in the absence of any request for such explanation.
7. An instruction that if plaintiff rendered the services under a contract between his parents and the defendant, although he was emancipated prior thereto, the making of such contract effected a revocation of such emancipation and precluded him from recovering, if he had knowledge of such revocation, was erroneous.
8. Refusal to give requested instructions correctly stating the law applicable to the case is error unless the substance thereof is otherwise given to the jury. The presumption that every one knows the law does not so apply as to justify such refusal.
9. Thus, in an action to recover for services on implied contract, refusal of instructions applicable to the particular case and correctly stating under what circumstances defendant would be liable on such a contract, was error where nothing equivalent was given in the general charge.
10. Whether a minor has been emancipated or not may be shown by an express agreement or by circumstantial evidence.
11. Evidence of casual statements or admissions of a party, made in casual conversations to disinterested persons, is regarded in law as the weakest kind of evidence.

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Reversed.*

Action to recover on implied contract. The complaint is to the effect that from the 17th day of July, 1899, to September 24, 1900, plaintiff rendered services to the defendant at the latter's request as a servant on his farm, of the reasonable value of $22 per month, or $308 in the whole, which became due and payable September 24, 1900, and that no part thereof has been paid, though payment thereof has been demanded. Defendant answered putting all the allegations of the complaint in issue, and pleading that about July, 1899, defendant

and plaintiff's father and mother made an agreement, the plaintiff being under the age of twenty-one years, to the effect that defendant should receive plaintiff as a member of his household, furnish him with board, lodging and washing, and afford him the advantages of defendant's professional library, he being a physician and surgeon, direct him in his reading and give him instruction preparatory to his entering a medical college and becoming a physician and surgeon, and plaintiff in consideration therefor while at defendant's home should make himself generally useful and perform such work and render such services for defendant as his time and convenience would permit; that the alleged services were performed under such agreement, and that all of the terms thereof were fully complied with by the defendant.

Upon the trial it was claimed on behalf of the plaintiff that he was emancipated by his parents before going to live with defendant, and before the arrangement with the latter was made. It was further claimed on the part of the plaintiff that he resided with and worked for defendant during the period mentioned in the complaint, under an agreement made between the latter and plaintiff's father that plaintiff should receive pay for his services. The jury found in favor of the defendant, and judgment was rendered accordingly. There was evidence tending to prove the respective contentions of the parties. Various rulings were made by the trial court to which exceptions were duly preserved for the purposes of appeal by the plaintiff.

F. W. Houghton, for the appellant.

For the respondent there was a brief by *Connell & Weidner,* and oral argument by *T. J. Connell.*

MARSHALL, J. A witness for the plaintiff, shown to know generally the course of affairs at respondent's home while appellant resided there, was permitted to state, on cross-examination, whether he ever heard the former request the latter

to do any work. It is said the evidence was prejudicially immaterial. It does not strike us that way. It was not claimed any express contract existed entitling appellant to compensation for his services. At the best for him it was claimed that out of the circumstances sprang an implied liability in that regard,—a presumption that he expected to receive compensation and respondent expected to render such, was relied upon. Such a presumption is always subject to explanation rebutting it. Any evidence tending that way was of course legitimate. Evidence as to how appellant was treated, respecting whether as a servant for hire or not, was supposed to be evidentiary along that line. Whether it was sufficiently such to be entitled to consideration by the jury was a question of competency. The decision of a trial judge on such a matter is not disturbable unless manifestly wrong. *Emery v. State,* 101 Wis. 627, 648, 78 N. W. 145. In the instance before us the indications are rather that the ruling was manifestly right instead of wrong.

Appellant's father testified in the former's behalf that respondent proposed to him to take appellant and make a doctor of him, and that after considering the matter with his wife he accepted the proposal with thanks for the opportunity offered the boy, saying to respondent that his son desired to be a doctor, and if he could get an education so as to gain admittance to a medical school and pay his tuition it would help him materially. To which respondent remarked that he knew how hard it was in his own case, working in the harvest fields for fifty cents a day to earn his tuition, and that it was much easier now than formerly for a young man to earn money; that it would take three to five weeks to arrange to take the boy. On cross-examination, apparently for the purpose of showing that the witness had made statements inconsistent with such evidence, this question was asked: "Did you not say to Mr. Hammie, 'I am anxious to get the boy to *Dr. Rice's* because it is a good place for him and he will learn

more than he would in school. I know the doctor will use him well'?" That was objected to as immaterial. The objection was overruled and the witness answered in the negative. The question seems to have been plainly immaterial, but we are unable to see that the answer could by any possibility have worked harm to appellant.

A witness was permitted to testify against objection by appellant's counsel that appellant's father advised him to make himself generally useful while at the doctor's place as the latter did not like lazy persons. It was allowed as bearing on whether appellant had been emancipated before going to the doctor's. The question was objected to as immaterial. It was perfectly consistent with control by the son of his own time for the father to advise him in respect to his conduct. Therefore the evidence was immaterial and misleading. Since it was admitted and the ruling in the matter was accompanied by a suggestion that it bore on whether the son was emancipated, it may have operated very prejudicially to appellant, because it was not legitimate as suggested by the court. What the father may have said to third persons as to his relations with his son, not in the presence of either of the parties to the litigation, and not properly offered to impeach the father, was incompetent.

Error is assigned because the court instructed the jury as follows: "And by a preponderance of evidence is not necessarily meant the side which has the most witnesses. It is the evidence which satisfies and convinces your minds and judgments." We agree with counsel for appellant that the learned court's definition is novel. The nearest approach thereto which we are aware of is in *Thomas v. Paul,* 87 Wis. 607, 613, 58 N. W. 1031, where the idea thus conveyed was unqualifiedly condemned as incorrect, though in that instance the instruction was held to be harmless, because it was given in close connection with one containing a correct definition worded with such clearness that it was thought the jury could

not have been misled by a statement that their belief as to the truth of the matter in dispute was to be regarded as the evidence to be relied upon, as regards the side having the preponderance of the evidence, instead of making the preponderance of the evidence the cause of the belief. There was no correct definition in this case. Whatever harmful effect could reasonably follow from such an erroneous definition may have occurred. What is meant by "preponderance of the evidence," the manner in which the jury should proceed in solving disputed propositions on evidence, and the degree of certainty to which they should arrive before rendering a verdict, are elementary. There is no need of any new phrasings in order to present the law in that regard to a jury. Efforts to state elementary principles in ways not found in the books are quite liable to work harm. The better way is not to depart from those definitions which have received judicial approval. The term "preponderance of the evidence" suggests the quality of outweighing in convincing power. So it means preponderance in the convincing power of the evidence. In the orderly way of determining the truth from evidence, the jury first consider the same and determine on which side of the dispute there is the greater weight thereof, the more convincing indications as to where the truth lies. They next determine whether such greater indications are sufficiently convincing to satisfy them of the truth of the matter, not beyond a reasonable doubt, for no such degree of certainty in civil cases is required, nor merely as to what the preponderance of the evidence tends to prove, for that degree of certainty leaves the truth of the matter possibly not more than suggested,—the mind being far from satisfied as to the real truth (*Gores v. Graff*, 77 Wis. 174, 46 N. W. 48),—but satisfied of the truth to a reasonable certainty. That doctrine has been frequently announced in this court. *Pelitier v. C., St. P., M. & O. R. Co.* 88 Wis. 521, 60 N. W. 250; *Curran v. A. H. Stange Co.* 98 Wis. 609, 74 N. W. 377; *Ward v.*

C., M. & St. P. R. Co. 102 Wis. 215, 219, 78 N. W. 442. True, it is said in *Guinard v. Knapp-Stout & Co. Co.* 95 Wis. 482, 70 N. W. 671, "If the mind of the jury is convinced and satisfied, it is quite safe to assume that the preponderance of the evidence is on the side of such conviction." The learned justice of this court who used that language, *arguendo,* when presiding at the circuit used the language in *Thomas v. Paul, supra,* which this court was constrained to hold "was obviously incorrect." It was not intended here to suggest the use of the expression so made in *Guinard v. Knapp-Stout & Co. Co.* as a correct definition of "preponderance of evidence" or to sanction such use as permissible.

The jury should be told in terms or in effect: You should find according as you shall be satisfied of the truth of the matter in controversy by a preponderance of the evidence. If it is deemed best to give greater definiteness to the term "satisfied" it is best to say, and if requested to do so the court should say: Before finding in favor of the party on whom the burden of proof rests to establish any fact, you should be satisfied of the existence thereof to a reasonable certainty. If it is thought best to explain the meaning of the term "preponderance of the evidence," or if requested to do so, the court should define it in terms, or in effect, as outweighing in convincing force, not merely as "that evidence which convinces your minds and judgments," though by a deductive process of reasoning that may be true. The proper definition suggests a comparison of the convincing power of the evidence on one side with that upon the other, and a determination of which outweighs the other as to the probabilities. The defective definition might mislead a jury into making a conclusion without their following that logical course which is supposed to be best calculated to reach a right result with the greatest degree of certainty practicable.

The question of whether the plaintiff was the owner of his own time during the period of the alleged services was sub-

mitted to the jury, and in connection therewith they were told that if they resolved it in the affirmative he was entitled to recover, if they found he had a cause of action, otherwise not. Complaint is made of that because the evidence was undisputed that plaintiff was free to dispose of his own time during the period mentioned, and the last part of the instruction was inconsistent and indefinite. We cannot agree with the suggestion that the evidence was entirely undisputed on the first proposition, nor that there was any inconsistency or indefiniteness in the last one. It did not follow as a matter of course, by any means, from the evidence, that appellant was entitled, as a matter of law, to recover if he was emancipated before going to the doctor, and the condition thus created existed during the period of the alleged service. It was still left for the jury to determine whether the understanding between them or their conduct was such as to give rise to a cause of action in respondent's favor, though since no explanation was made to the jury as to what circumstances would give rise to such a cause of action they were left without any guide in the matter. However, so far as the instruction went it was right. No fatal error was committed in not going farther, except as proper requests in the matter were refused.

The jury were instructed in regard to partial as well as total emancipation. Error was assigned on that for the reason that there was no evidence respecting partial emancipation, and further for inconsistency and indefiniteness in the instruction. Without taking time or space to discuss the evidence, we will state as our conclusion that there were evidentiary circumstances along that line. No inconsistency or confusing element in the instructions is pointed out and we cannot discover any.

The jury were further instructed that if plaintiff performed the work for which a recovery was sought under a contract between his parents and the defendant, although he

was emancipated prior thereto, the making of such contract effected a revocation of such emancipation and precluded him from recovering, if plaintiff had knowledge of such revocation. That is complained of and rightly too. The evidence is undisputed that whatever agreement existed it was made between appellant's parents and respondent with his knowledge. The effect of the instruction, as the jury might well have understood it, was the direction of a verdict for respondent. Possibly the learned court meant to be understood as saying that if appellant's parents, in the attitude of controlling his time, made a contract for the disposition thereof to his knowledge and with his consent, it operated as a resumption of parental control, if such control had been previously surrendered. The jury might well have understood that if the parents assumed to make the agreement, whether they intended to act inconsistent with appellant being the disposer of his own time or not, and he knew of the act and shaped his course in harmony therewith, it operated to revoke the prior emancipation.

Other parts of the instructions given, which were excepted to, will not be discussed since appellant's counsel has not seen fit to point out any reason why they should be deemed prejudicial.

The court by several requests was asked to instruct the jury to the effect that if a person labors for another, with that other's knowledge and consent, no rate of compensation being fixed and no express contract being made or request to do the work being shown, the law presumes, in the absence of evidence to the contrary, that such person expected to receive and such other to pay compensation for the services upon the basis of the reasonable value thereof; that the law presumes that the services were rendered upon request, and that if such other knew at the time of such rendition that such person expected compensation as a matter of right, and nevertheless accepted the services, he is liable, as a matter of

law, for the reasonable value thereof. All the instructions on that line were rejected, and nothing equivalent thereto or in any way touching the subject was given in the general charge. It is conceded, as we understand it, and as the fact is, that such instructions stated the law correctly and were applicable, but it is suggested that the jury must have so understood the law without assistance. That is hardly a sufficient answer to appellant's complaint. The requested instructions were, on every point to which we have referred, applicable to the issues raised by the pleadings and the evidence produced in respect thereto. They should have been given, or the law to the same effect should in some proper manner have been stated in the general charge. *Allen v. Perry,* 56 Wis. 178, 14 N. W. 3.

The learned court, in effect, stated that plaintiff was entitled to recover if he established by the evidence a cause of action, but gave the jury no guide as to what facts were necessary to that end. Doubtless, the court supposed that from the statement of the claims made by the respective parties as given in the instructions, and from the general trend of the case, the jury would understand what facts would entitle appellant, as a matter of law, to recover. The jury often may know the law without judicial assistance, but that does not excuse a refusal to give specific instructions, properly worded and seasonably requested, which are applicable to the case. Ordinarily every one is presumed to know the law, but that does not apply to a jury, else one of the most important duties devolving on the trial judge under our system would not exist.

Appellant's counsel further requested the court to instruct the jury that the status of a person in his minority, as to whether emancipated by his parents or not, may be shown by an express agreement or circumstantial evidence. That was good law and was applicable to the case and should have been given.

The court was further requested to instruct the jury that "evidence of casual statements or admissions of a party, made

in casual conversations to disinterested persons, is regarded by law as very weak testimony, owing to the liability of the witness to misunderstand or forget what was really stated or intended by the party. It is considered to be the weakest kind of evidence." That was applicable to the evidence which the jury had to deal with. There was considerable evidence of the nature suggested in the request. Such request was good law according to the repeated decisions of this court, and therefore it should have been given to the jury. *Haven v. Markstrum,* 67 Wis. 493, 30 N. W. 720; *Emery v. State,* 101 Wis. 627, 78 N. W. 145.

There were some other requests made and refused, but the substance thereof has either been covered by what has already been said, or they were inapplicable to the evidence, or included in the general charge.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

KINGSTON and others, Appellants, vs. KINGSTON, Respondent.

January 31—February 21, 1905.

Appealable orders: "Final order" in special proceeding.

1. An order appointing a referee under sec. 3, ch. 300, Laws of 1899 (providing for a special proceeding for the sale of future contingent interests in lands), is not a "final order" within the meaning of subd. 2, sec. 3069, Stats. 1898.
2. The provision in sec. 3047, Stats. 1898, that appeals may be taken from "interlocutory judgments," has no application to interlocutory orders in special proceedings.

APPEAL from an order of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Dismissed.*

The appeal is from an order appointing a referee under

the provisions of sec. 3, ch. 300, Laws of 1899. Respondent moves to dismiss because of asserted nonappealability of the order.

For the appellants there was a brief signed by *Connell & Weidner,* attorneys for *Samuel Kingston* and others, and by *T. E. Ryan,* guardian *ad litem* for *Albert Peck* and others, minors, and oral argument by *T. J. Connell* and *Mr. Ryan.*

For the respondent there was a brief by *Tullar & Lockney,* and oral argument by *D. S. Tullar.*

DODGE, J. Appealability of this order must find support, if at all, in subd. 2, sec. 3069, Stats. 1898, as "a final order affecting a substantial right made in a special proceeding." Ch. 300, Laws of 1899, clearly provides for a special proceeding, as distinguished from an action. Sec. 3 directs that, immediately upon the presentation of an application for sale of the real-estate interests of persons therein described, the circuit court must appoint some suitable person as referee to make such sale, who shall give bond. Upon the coming in of his bond the court is to proceed to hear the evidence, by itself or on reference, and to determine whether such sale should be made, and to enter an order according to such determination, either directing sale or dismissing the proceedings. A final order in a special proceeding, within the meaning of this statute, is one which determines and disposes finally of the proceeding—one which, so long as it stands, precludes any further steps therein. It bears the same relation to the proceeding in which it is entered as the final judgment bears to an action. 2 Ency. Pl. & Pr. 72; *In re Schumaker,* 90 Wis. 488, 63 N. W. 1050; *Maynard v. Greenfield,* 103 Wis. 670, 79 N. W. 407; *State ex rel. Att'y Gen. v. German Exch. Bank,* 114 Wis. 436, 439, 90 N. W. 570; *Mitchell v. Kilburn,* 74 N. C. 483; *McCredie v. Senior,* 4 Paige, 378; *Beebe v. Griffing,* 6 N. Y. 465; *In re Freeholders of Irondequoit,* 68 N. Y. 376, 380; *In re Grab,* 157 N. Y. 69, 51 N. E.

398. It is perfectly clear that the order appointing the referee under sec. 3 of this act is not of such character. It is to be entered *ex parte,* before hearing, and leaves for investigation and for determination by some subsequent order all of the merits presented by the application. It is clearly intermediate, and not final. Hence we must conclude that it is not within the description of those orders which are rendered appealable by the above-cited section of the statutes.

Some suggestion is made that more recent legislation, first appearing in the Statutes of 1898 as an amendment to sec. 3047, provides that appeals may be taken from "interlocutory judgments." This, however, applies by its terms to interlocutory judgments which can be entered only in "actions." Sec. 2883. It has no application to interlocutory orders in special proceedings. They are not judgments, within the terminology of the Code or the statutes authorizing appeals.

By the Court.—Appeal dismissed.

HAMAR, Appellant, vs. LEIHY and others, Respondents.

February 1—February 21, 1905.

Municipal corporations: Street improvements: Special assessments: Tax certificates: Limitation of actions.

1. Where a special assessment for street improvements is void, not for want of power on the part of the city, but because of a failure to take the necessary steps in the exercise of such power, the land assessed is "liable to taxation" within the meaning of sec. 1189, Stats. 1898, and the statute of limitations (sec. 1210*h*) is applicable to the tax certificate issued upon a sale for such assessment.
2. Although the assessment upon abutting property may be void in such a case because no grade for the street was established, as required by the city charter, before the improvement was made, such property is nevertheless within the taxing district and liable to taxation within the meaning of sec. 1189.

3. If the assessment is void because the land of one owner was assessed together with a strip belonging to another, the statute of limitations (sec. 1210*h*) is nevertheless applicable to the tax certificate.
4. A portion of a city lot was embraced within the right of way of a railroad. A certain amount for street improvement was specially assessed upon the other portion, excluding the right of way, and the tax certificate issued upon a sale for such assessment described the lot by number, "less right of way." *Held*, that the assessment was not void on the ground that the two parts of the lot, belonging to different owners, were assessed together.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This action was brought in 1903 to foreclose a tax certificate bearing date May 15, 1894, based upon a special assessment for paving, charged against lot 1, block 85, Ellis division, city of Ashland, less right of way. The complaint is in the usual form for foreclosure of tax certificate, and alleges that more than one year has expired since the date of the certificate, and that no action or proceeding to set aside the sale of such lands, or to cancel said certificate, or to restrain the issuing of any tax certificate or tax deed on such sale, has been commenced, and that the defendants are barred from setting up the illegality of said certificate.

The defendants answered that the tax certificate was null and void for the reason that the special tax carried out by the city clerk of the city of Ashland in 1893 as a paving tax was void because no grade had been established and no pavement ordered and no preliminary steps necessary to the paving of said street taken; and that the Wisconsin Central Railway Company owned a part of said lot, but the whole tax was charged against defendants. Substantially the same facts were set up by way of counterclaim, with prayer that the tax certificate and tax be declared void and canceled. Plaintiff replied to the counterclaim, denying the material allegations thereof.

The action was tried by the court, and judgment rendered for the defendants on the counterclaim, canceling and setting aside the tax and tax certificate, from which judgment plaintiff appeals to this court, and assigns as error (1) the admission of evidence under the counterclaim, and (2) the entering of judgment canceling and setting aside tax and tax certificate without requiring defendants to pay the plaintiff the amount for which the property was sold, with interest.

For the appellant there was a brief by *Sanborn, Lamoreux & Pray,* and oral argument by *A. W. Sanborn.*

For the respondents there was a brief by *J. J. Miles* and *Tomkins, Tomkins & Garvin,* and oral argument by *W. M. Tomkins.*

KERWIN, J. 1. The main question involved is whether the certificate is protected by the statute of limitation, more than one year having elapsed between the date of the certificate and the commencement of the action. Sec. 1210*h,* Stats. 1898, provides:

"Every action or proceeding to set aside any sale of lands for the nonpayment of taxes, or to cancel any tax certificate, or to restrain the issuing of any tax certificate or tax deed for any error or defect going to the validity of the assessment and affecting the groundwork of such tax, or on account of any void or defective special assessment, shall be commenced within one year from the date of such tax sale and not thereafter. . . ."

Sec. 1189, Stats. 1898, provides, among other things, that no statute of limitation shall apply where the land was not liable to taxation; and it is contended that because the charter required the grade to be established and other proceedings taken before any assessment could be made, and this not having been done, the lot was not taxable for paving, hence the statute of limitation did not apply. We think the contention is untenable. The city authorities had power to establish the grade and take all proceedings necessary to make a valid as-

sessment for street paving. They simply failed to exercise a power which they had, or irregularly exercised it. The distinction is plainly marked in many cases in this court. The cases relied upon by counsel for respondents are cases where there was a lack of power. In *Dietz v. Neenah,* 91 Wis. 422, 64 N. W. 299, 65 N. W. 500, the city attempted to levy a special assessment under a law which made no provision for notice at any stage of the proceeding, and this court held that the city had no power under the law to make any assessment because there was no law authorizing it. To the same effect is *Oshkosh City R. Co. v. Winnebago Co.* 89 Wis. 435, 61 N. W. 1107. Here an attempt was made to impose a tax upon the right of way of the railway company, which lay wholly within the public streets of the city of Oshkosh, and this court held that the law did not authorize it, and that the city, therefore, was without power to make any such assessment. *State ex rel. Moore v. Ashland,* 88 Wis. 599, 60 N. W. 1001, is a case where the common council had authority of law to make the assessment, but made it upon a wrong basis and irregularly; therefore this court held it was void. There was no want of power, but an irregular exercise of power. As said by Mr. Justice WINSLOW, speaking for the court: "The steps necessary to make a valid assessment for the paving of a street against abutting lots are found in ch. 17 of the charter of the city of Ashland. Laws of 1889, ch. 27." In *Schintgen v. La Crosse,* 117 Wis. 158, 94 N. W. 84, it is true the court said:

"When it appeared that the plaintiff's premises were exempt from assessment unless a certain particular state of facts existed, the duty rested on the city of showing that such state of facts did actually exist. This was not shown, and hence in the present case, for this reason alone, the reassessment in question must be set aside."

But in that case it was not a question of want of power on the part of the city, but the failure to exercise it. The city

authorities had the power to subject the premises to assessment, but failed to take the necessary steps. There was no question of statute of limitation in the case, nor of the application of sec. 1189, Stats. 1898. Plaintiff's premises were exempt from the assessment, not because of lack of power to subject them to assessment, but because of failure on the part of the city authorities to exercise the power with which the law clothed them in order to make the premises liable to assessment. The distinction is whether the assessment be void on account of defect in the proceedings or failure to do things which the law requires to be done, and cases where the property could not be legally assessed under any circumstances by reason of the absence of any law authorizing such assessment.

Counsel for appellant contends that, no grade having been established, the property was not within the taxing district and was exempt from taxation, because the city authorities at the time of making the assessment had no power until a grade had been established, and *Smith v. Sherry,* 54 Wis. 114, 11 N. W. 465, is cited as authority upon this point. It will be seen, however, that in *Smith v. Sherry, supra,* the property was outside of the taxing district of the municipal officers who attempted to levy the tax, and they were without jurisdiction under any circumstances to levy the tax. This court has directly held that the statutory bar provided by sec. 1210*h* applies to tax sale and certificates issued for street improvements. *Levy v. Wilcox,* 96 Wis. 127, 70 N. W. 1109. In *Pratt v. Milwaukee,* 93 Wis. 658, 68 N. W. 392, Mr. Justice MARSHALL, in speaking for the court, says:

"It is claimed that the property taxed was not subject to taxation at the time it was assessed. Under this assignment of error, several instances are pointed out wherein the condemnation proceedings, which form the groundwork of the tax, were not in conformity with the law governing the subject—such as that the necessity for taking the property was not first determined by a constitutional jury; that another proceeding, previously commenced, for taking the property

for the same purpose, was pending; that the resolution whereby the proceedings were instituted did not describe the land to be taken. These and other alleged irregularities or errors are mentioned to support the contention that the condemnation proceedings were void, hence that appellant's property was not liable to taxation for any portion of the damages awarded to the owner of the real estate taken by such proceedings, and, therefore, that the statute of limitations (sec. 1210*h*, S. & B. Ann. Stats.) does not apply, under the rule laid down in *Smith v. Sherry*, 54 Wis. 114, 11 N. W. 465. Counsel misapprehends the scope of *Smith v. Sherry*. It only applies to cases where there is a want of authority, *ab initio*, of the taxing officers to put the taxing power in motion, as where property is exempt from taxation, or where the property taxed is without the taxing district. Such were the circumstances in that case. There is no question but that appellant's lot was in the taxing district where assessed for the taxes complained of, and that it was liable for the tax in question, and that collection of such tax could be enforced if all the statutory requisites were followed necessary to legally levy the tax. Such being the case, all questions covered by the statute of limitations (sec. 1210*h*, referred to) are at an end, the period named in the section having expired before the commencement of this action, and the statute having been properly pleaded. *Knox v. Cleveland*, 13 Wis. 245."

In the case at bar the attack goes to the groundwork and validity of the tax. The property being subject to taxation, the taxing officers having the power and authority to take the necessary steps to make a valid assessment, and the statute having been properly pleaded, the certificate is protected by sec. 1210*h*, Stats. 1898.

2. It is further claimed by respondents that the certificate is void and the statute of limitation does not apply, for the reason that defendants' property was assessed together with a strip of land belonging to the Wisconsin Central Railway Company. If this rendered the certificate void, we think it would still be protected by the provisions of sec. 1210*h*, Stats. 1898. *Towne v. Salentine*, 92 Wis. 404, 66 N. W. 395. But

from the evidence in this case we are unable to see that the tax certificate is void, or even irregular, because of this alleged defect. It seems that a portion of the lot covered by the certificate in question is embraced within the right of way of the Wisconsin Central Railway Company, and the balance owned by the defendants. The certificate upon its face describes the property as lot 1, block 85, "less right of way," and it is quite apparent from the record that the amount of the certificate was charged against the portion of the lot owned by the defendants, and that the portion occupied by the railway company was not included, or intended to be included, in the certificate in question.

From what has been said it follows that the certificate was protected by sec. 1210*h*, Stats. 1898, and the court below erred in admitting evidence tending to show that no valid assessment had been made, and in entering judgment setting aside and canceling the tax and tax certificate.

By the Court.—The judgment of the court below is reversed, and the cause remanded for further proceedings according to law.

THE STATE EX REL. J. S. STEARNS LUMBER COMPANY, Appellant, vs. FISHER, City Clerk, Respondent.
SAME, Respondent, vs. SAME, Appellant.

February 1—February 21, 1905.

Taxation: Saw logs: Place of assessment: Valuation: Board of review: Evidence: Decision: Reversal on certiorari.

1. Under sec. 1040, Stats. 1898, saw logs which are manufacturers' stock are to be assessed where located on May 1st, unless at that time it was the purpose of the owner to have them sawed or manufactured in some mill in this state, in which case they are to be assessed where such mill is located.

2. The determination of the assessor as to the place at which property is assessable, as well as his determination in respect to its value, when attacked before the board of review, is presumptively correct and should be overturned only upon definite evidence impeaching it.
3. The decision of a board of review upon a matter properly before it cannot be reversed on a common-law writ of *certiorari* merely because, in the opinion of the court, it is against a clear preponderance of the evidence. If the evidence affords a reasonable basis, from the standpoint of the board, for the decision the error is not jurisdictional.
4. The evidence in this case is *held* sufficient to support the decision of the board of review, sustaining the assessor's determination, that on the 1st of May the owner of saw logs purposed having them sawed at the place where they were assessed, although on that day they were located elsewhere.
5. Testimony of the owner's agent that two fifths of a quantity of logs were worth only $5 per M., together with his refusal to state the value of the remainder, did not so impeach the assessor's valuation of the whole quantity at $10 per M. as to make it a jurisdictional error for the board of review to uphold that valuation.

APPEALS from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed on plaintiff's appeal; reversed on that of defendant.*

The plaintiff sued out of said court a writ of *certiorari* to review the proceedings of the board of review of the city of Ashland respecting its property there assessed for taxation in 1903. The petition was to this effect: In May, 1903, the assessor of the city of Ashland, in Ashland county, Wisconsin, assessed for taxation 5,000,000 feet of logs belonging to the petitioner, valuing the same at $10 per M. Such logs were, subsequent to the 1st day of May, 1903, removed from the town of Sanborn in said county to Mowatt's mill in said city of Ashland. Prior thereto and ever thereafter petitioner's principal place of business was in said town, where it owned and operated a sawmill. Seasonably after such assessment the petitioner, before the board of review, protested against the same because the logs were assessable in the town of San-

born instead of the city of Ashland, and 2,000,000 feet thereof were hemlock, worth not to exceed $5 per M. feet. In support thereof L. K. Baker, on behalf of the petitioner, testified to the character and value of the logs as stated; that no contract existed on the 1st day of May, 1903, for sawing the logs; that they were not in the city of Ashland on such day. The board denied the petitioner's application to reduce the assessment or strike the same from the assessment roll.

The return to the writ was to the effect that the logs were assessed to the petitioner; that he seasonably protested against the same, and that the board refused to change the assessment, basing its decision upon evidence returned which, so far as necessary to indicate whether the board committed jurisdictional error or not, is substantially as follows:

Mr. Baker's evidence:—May 1, 1903, the logs in question were in the town of Sanborn, mainly on the banks of Lake Superior. We had no arrangement about sawing them on that day. I cannot say that I knew on that day where they were going to be sawed. They were brought into the city of Ashland about the 5th day of May, 1903. 2,000,000 feet thereof were hemlock, not worth to exceed $5 per M. feet. I can't say just how much they were worth. The logs were reservation logs and had to be sawed on the reservation unless the government permitted us to saw them elsewhere. We had a mill in the town of Sanborn on the reservation where we had our headquarters. I did not know on the 1st day of May that the logs would not be manufactured there. It was much more convenient to manufacture them elsewhere, but it was not impossible to move them to the Sanborn mill. I cannot say that it was, on the 1st day of May mentioned, not deemed probable that the manufacture would occur at said mill. There was no practicable way of moving the logs to a place for manufacturing the same, other than by rafting them. We could have taken them in rafts to the Sanborn mill. I did not know but what we would have to. I can't say whether

we got permission to manufacture the logs in Ashland by May 5, 1903. I can't tell positively.

The matter was heard on the return, resulting in a decision that the assessment of the logs at $50,000 was contrary to the evidence, and that the valuation was excessive to the extent of $10,000. Thereupon judgment was rendered affirming the assessment at $40,000, and otherwise reversing it. Therefrom both sides appeal.

George F. Merrill, for the petitioner

F. J. Colignon, for the defendant.

MARSHALL, J. The logs were assessable in the city of Ashland, if on the 1st day of May, 1903, it was the purpose of the owner to have them sawed at some mill in that city, otherwise they were assessable in the town of Sanborn where they were located. Sec. 1040, Stats. 1898, states that unmistakably in these words:

"Manufacturers' stock . . . shall be assessed in the district where located. Saw logs and timber which are to be sawed or manufactured in any mill within this state which is owned or leased by the owner of such logs or timber or in which such logs or timber are to be sawed or manufactured by or for the owner thereof shall be assessed as manufacturers' stock in the district where such mill may be located. . . . No change of location or sale of any personal property after the first day of May in any year shall affect the assessment made in such year."

The logs were manufacturers' stock. The principal place of business of the owner in this state was in the town of Sanborn, in Ashland county. The logs were to be manufactured in this state. Their location on the 1st day of May, 1903, in such town fixed their *situs* for taxation for such year, unless the same was other than such town by reason of a formed purpose existing on such day to saw them at a mill determined upon elsewhere. No condition created after that day enters into the question of where the property was taxable.

It was the duty of the assessor in the first instance to determine the proper *situs* of the property for taxation. His determination thereof, as well as that in respect to the value of the property, in the controversy before the board of review, was presumptively correct. It could only be overturned by some definite evidence impeaching it. The mere fact that his decision was challenged by the property owner by no means cast upon him or the municipality the burden of justifying it. It was the duty of the board to regard such decision as a verity in the absence of definite evidence supporting the allegations in opposition thereto. By no other rule would it be practicable for boards of review to deal with the multitude of protests which might be made before them by property owners. Furthermore, it must be remembered, in dealing with a matter of this sort, that when the decision of a board of review is challenged as not justified by the evidence the real ground of complaint is jurisdictional error, and to constitute such error it must appear that the evidence was so overwhelmingly opposed to the decision that after giving thereto all the weight which it will reasonably bear, keeping in mind that the board has the same advantage over a reviewing tribunal as regards determining the truthfulness of evidence that a trial court possesses, there is no reasonable ground for the decision to rest upon. Where there is evidence tending both ways on a proposition for discussion affording a reasonable opportunity for the exercise of judgment in respect to the matter the board has jurisdiction to act, which means that it has jurisdiction to err as to what is the real right of the matter, and there is no redress for the error, if one is committed, by common-law writ of *certiorari,* which goes only to jurisdictional errors. *State ex rel. Augusta v. Losby,* 115 Wis. 57, 90 N. W. 188; *State ex rel. Vilas v. Wharton,* 117 Wis. 558, 94 N. W. 359; *State ex rel. Foster L. Co. v. Williams,* 123 Wis. 61, 100 N. W. 1048. So it is not permissible in reviewing the proceedings of a board of review on such a writ for the

circuit court to investigate the evidence upon which the board acted to determine upon which side of the controversy it preponderates and to decide accordingly. Its duty is fully performed, except as to the rendition of the proper judgment, when it proceeds far enough to discover that there is a reasonable basis, from the standpoint of the board, for the decision which it rendered. Having reached that conclusion, an affirmance of the judgment challenged should follow, though the court may yet be of the opinion that the evidence before the board clearly preponderated contrary to its finding. The cases to that effect decided by this court are numerous and are in the main referred to in *State ex rel. Foster L. Co. v. Williams, supra.*

It seems probable from the record that the learned trial court did not appreciate the principle last discussed, and supposed that it was permissible for it to reverse the decision of the board if merely found to be contrary to the clear preponderance of the evidence. So recently as the time of the presentation here of the case last cited able counsel insisted that such was the trend of the late decisions of this court. That such was a mistaken and moreover a baseless view of such decisions, we took considerable pains to demonstrate, to the end that the danger might be avoided or removed, if any such danger existed, of the trial judge being misled thereby. In the record before us the learned judge in reversing the decision of the board used language appropriate to a conclusion that it was against the clear preponderance of the evidence, instead of that it was wholly unsupported by the evidence.

Now on the subject of whether on the 1st day of May, 1903, the owner of the logs purposed having them manufactured in the city of Ashland, the circumstances very strongly support the determination of the assessor. It was clearly shown that the difficulties in the way of transferring the logs to the owner's mill in the town from where they were located were so great that it was highly improbable that any such pur-

pose existed. It was shown that within four days after the 1st day of May the logs were put into the water, prepared for transportation, and were actually delivered at the Ashland mill to be manufactured. The work of rafting such a quantity of logs, arranging for their transportation, and actually making the transit from the bank to the mill is so great as to strongly indicate that the purpose to move the logs to Ashland on or prior to the 1st of May must have been formed. It is highly probable that the owner's agent knew definitely about the matter, yet he refused to testify to any reasonable degree of certainty in respect thereto. Considering all the circumstances from the standpoint of the record alone, we are unable to discover any definite evidence that the purpose of the lumber company was not as early as May 1st formed to have the logs sawed at Ashland. On the contrary, the evidence seems to pretty strongly indicate that such a purpose did then exist. If the fact be otherwise, we are utterly unable to understand why the witness Baker did not squarely say so, and testify to the existence of circumstances consistent therewith. The board of review was warranted in deciding that there was no reliable evidence to impeach the assessor's determination. But if that were not so, the trial court was not warranted in concluding that there was no substantial basis for the board's decision, and that it therefore acted outside of its jurisdiction.

On the question of whether error was committed in reversing the decision of the board as to the valuation of the logs there seems to be less difficulty than as to the one already discussed. As we have already intimated, the learned court seems not to have fully appreciated that only such a departure from the evidence on the part of the board as, under rules governing the subject, constitutes jurisdictional error, was fatal to its decision. *Prima facie,* as we have seen, the valuation of the logs made by the assessor was right. No evidence was produced before the board that the logs on the average were not worth $10 per M. The evidence rather tended to cor-

roborate than to impeach that. It might well be true that two fifths of the logs were worth $5 per M., and the rest worth enough in excess thereof to make the average price $10 per M. The owner's agent testified frankly that the pine logs were worth more than that figure, but when pressed to state the full value thereof he declined to do so. That refusal strongly indicates that the valuation by the assessor upon the average was correct. We are unable to see any basis whatever for holding that there was evidence impeaching such valuation so conclusively that the decision upholding it was jurisdictional error.

From the foregoing it follows that the judgment upon the appeal of the plaintiff, the *J. S. Stearns Lumber Company,* must be affirmed, and upon the appeal of the city clerk of the city of Ashland it must be reversed, and the cause remanded with directions to enter judgment affirming the decision of the board of review, with costs in favor of such clerk.

By the Court.—So ordered.

MILES, Appellant, vs. PIKE MINING COMPANY and another, Respondents.

February 1—February 21, 1905.

Fraudulent representations: Mining option: Notice of assessments: Payment by administrator: Right to recover: Conversion.

1. **Plaintiff's intestate had owned an interest in a mining option and had paid his proportionate assessments, and this interest was inventoried as an asset of his estate. After his death a corporation was organized, to which the option was transferred as full payment for its stock. No stock certificates were issued, but assessments upon the several owners were made as before. The notices of these assessments stated that the directors of the corporation had levied a certain assessment upon each share of assessable stock, specified the number of shares sup-**

posed to be owned by each person notified, and requested a remittance. Plaintiff, as administrator, paid several of these assessments, knowing that neither the decedent nor the estate held any stock in the corporation. He also understood that stock representing the decedent's interest would be issued on application and, under the law, would be nonassessable. He knew, too, that the decedent's interest in the mine had been called "stock," and had been held with the understanding, among the associate owners, that they should pay proportionate assessments as might be necessary for development, etc. *Held*, that the sending of said notices to plaintiff as administrator did not constitute actionable fraud or deceit which would entitle him to recover, in a tort action, the amount so paid by him.

2. Assuming that an administrator may sue to recover back property unlawfully diverted from the estate, even though he knowingly participated in the unlawful act, and assuming that the application of moneys of an estate to a known unlawful purpose by persons to whom such moneys were paid by the administrator might constitute such conversion as to warrant an action in tort for damages, yet where, among the assets of an estate, was an interest in a mine which was expected to require, from time to time, advances for protection or enhancement of its value, payments made in good faith by the administrator for that purpose, and so received and applied by those in charge of the mine, do not warrant any inference of fraud or wrongful intent, and—especially where there is nothing to show that the value of the property has not been enhanced to the full amount of the payments—do not give the administrator any right to recover damages in a tort action against those who received the moneys.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

Plaintiff's decedent for many years had been one of several owners in a so-called mining option, being an option or privilege to prospect on certain land and to receive a lease of mining privileges upon certain conditions. That option had been held under various names, but for some years prior to the death of said decedent was held by one Pike, said decedent's interest therein being about one sixteenth, or, as it was expressed, 2,550 shares out of a total of 40,000. The associates

had acted as if incorporated for many years, and the expenses of the prospecting had been paid by them, on call, proportionately to their respective shares. The enterprise had received several designations, but latterly that of the "Pike Option." At one time a corporation had been organized, in which no stock was formally issued, but the associates were understood to hold shares in the same proportion as above stated. Decedent's investment at the time of his death had reached some $5,000 or $6,000, which was inventoried as an asset. Shortly after his death articles of association were filed under the name of the *Pike Mining Company,* and some of the associates formally signed subscription for their proportionate shares of stock, but no certificates were issued to them. The lease held by Pike was surrendered, and a new lease taken out in the name of the *Pike Mining Company* as full payment for its total stock. After such incorporation, calls were made from time to time on the various associates for paying the expenses of further prospecting, working, and development. Plaintiff, as administrator, received notices of such demands from those who had acted previously under the designation of "Secretary" and "Treasurer" of the associates, and who were elected secretary and treasurer of the new corporation. He voluntarily paid such assessments, or calls, up to the amount of $3,232, which was expended, together with the contributions of the other associates, in developing the property. After paying these amounts he learned that such certificates of stock in the new corporation as had been issued declared the stock fully paid and nonassessable, and, further, he conceived a doubt as to whether he had any right, as administrator, to pay out the moneys of the estate for this purpose. He therefore brought suit against the *Pike Mining Company,* the corporation, and *Charles Latimer,* its treasurer, who had personally received his checks as administrator and deposited them to the credit of the corporation, alleging that he had been induced to make said payments by reason of the

false and fraudulent representation made by defendants to him that his decedent was the owner of 2,550 shares of the capital stock of said corporation and that the estate was indebted to said company for the assessments made, and that the defendants received said money and wrongfully and unlawfully converted the same to their own use, well knowing that they had no right to receive, retain, or use the same, and that they had refused to repay on demand; therefore he prayed judgment for the amount so paid.

At the opening of the trial, being put to an election as to whether he stood on allegations of tort or contract, he elected tort, and the case was tried on that theory. At the close of the plaintiff's case, wherein substantially the foregoing facts were proved, the court granted the defendants' motion for nonsuit and entered judgment accordingly, from which plaintiff appeals.

For the appellant there was a brief by *Tomkins, Tomkins & Garvin,* attorneys, and a separate brief by *James G. Flanders,* of counsel, and oral argument by *W. M. Tomkins* and *Mr. Flanders.*

For the respondents there was a brief by *Lamoreux & Shea,* attorneys, and *John M. Flynn,* of counsel, and oral argument by *W. F. Shea.*

Dodge, J. The cause of action presented by the complaint is extremely uncertain. We find it difficult to discover any action of tort except one for deceit, namely, for inducing plaintiff to pay over certain moneys by fraudulent misrepresentation that the estate was the owner of 2,550 shares of the capital stock of the defendant corporation and was indebted to the corporation for assessments thereon. No proof of such representation is found or suggested except certain notices sent to the plaintiff. Of these the first is typical, and asserted, in substance, that on June 24, 1902, at a meeting of the directors of the *Pike Mining Company,* "an assessment of 60%

was levied upon each share of assessable stock, 10 cents per share on the 10th of each month, commencing with July 10, 1902, until the full 60 cents per share is paid. Please remit; make remittances to *C. F. Latimer,* Treasurer, Ashland, Wisconsin, on or before July 10, 1902. 2,400 shares at 10 cents per share, $240. George Quayle, Secretary." At this time the plaintiff knew, in a general way, that a change had been made in the name or custody of the legal title under which the various associates claimed rights in this mining property, and that a corporation had been organized to take that legal title in place of either Mr. Pike or the pre-existing West Brotherton Mining Company. He knew that such organization and change had been made since the death of his intestate, and therefore that neither the deceased nor his estate held any capital stock in that corporation. He also understood that he could get stock as representing his interest in the enterprise by applying for it, and that such stock, when issued in consideration of such shares, would, under the law of Wisconsin, be nonassessable. He also knew, as he alleges in his complaint, that the indefinite interest in the mine had been called "stock," and was held with the understanding, amongst the associates, that they should respond to proportionate assessments as might be necessary for the protection or development of that mine. It seems to us clear, therefore, that if these notices conveyed to his mind any assertion that his estate was the holder of assessable stock, he must have understood it as referring to the so-called "stock" or equitable shares in the mining property, and not to technical capital stock in the *Pike Mining Company.* There is in these notices neither assertion that the plaintiff, as administrator, or his estate owned any such stock, nor that either was indebted for any assessment; but, if it might bear such construction, still plaintiff could not have been misled, for he knew to the contrary. Deceit or fraud is not to be lightly inferred, but must be clearly and directly established. Jones, Evidence, § 190; *Shaw v.*

Gilbert, 111 Wis. 165, 189, 86 N. W. 188. We must agree with the trial court that the allegation of deceit by misrepresentation, set forth in the complaint, is not at all supported by these notices, and, as we have said, is without other proof, hence that there was no evidence to go to the jury upon the technical action of deceit.

It is, however, urged by appellant that there can be spelled out of this complaint something in the nature of an action in trover, based upon the fraudulent conversion of moneys of the estate paid by the plaintiff and received by the defendants for an unlawful purpose, to the knowledge of all, and that such action can be maintained by the administrator in his representative capacity and in protection of the true beneficiaries, notwithstanding the fact that he personally had knowledge of the unlawful character of the payment when he made it. It would be difficult to find this cause of action expressed in the words of the complaint, at least with the clearness of allegation which is demanded in the case of fraud; but, as it must be presumed that a new action may be commenced based upon any allegations which would be supported by the facts, it seems best to consider the case as it appeared upon the evidence, rather than as limited by the allegations of the complaint; remembering, however, that only so far as some tort action is supported can the nonsuit be held erroneous.

We are not inclined to question the right of an administrator to sue to recover back property unlawfully diverted from his estate merely because he participated, even knowingly, in that unlawful act. The interest to be protected by such a suit is that of the true beneficiaries, and not of the person who happens to be administrator. There is much reason, therefore, for overlooking the assumed absurdity of his suing a third person to undo a wrongful act of his own. It will not be necessary in this case to decide just what circumstances may be consistent with the maintenance of such an action and what inconsistent. Two illustrative cases on opposite

sides of the line are cited by the appellant from New York, namely, *Wetmore v. Porter,* 92 N. Y. 76, and *Woodbridge v. Bockes,* 170 N. Y. 596, 63 N. E. 362. Neither shall we deem it necessary to pass upon the somewhat technical objection, raised by respondent, that the action of trover is maintainable only upon a refusal to return specific property, and cannot be maintained here because no specific bank bills, or other forms of money, are shown to have been delivered to the defendants and withheld by them in resistance to a demand for their return. We shall proceed on the assumption, without deciding its correctness, that the application of moneys of an estate to a known unlawful purpose by the defendants might constitute such conversion as to warrant an action in tort for the damages thereby occasioned, although no case supporting that assumption has been cited to us, all of the cases presented being either upon an imputed contract or in equity.

The defendants can be guilty of tort only in case of actual fraudulent intent in receiving the money in question. True, that intent need go no further than to appropriate moneys of the estate to a purpose which defendants knew, or as reasonable men ought to have known, was unlawful. To that extent, however, turpitude must appear. The law always presumes innocence rather than fraud. Hence the rule, so often declared, that the burden of proof is upon him who alleges fraud to prove it, and that, too, clearly and satisfactorily. *Shaw v. Gilbert,* 111 Wis. 165, 86 N. W. 188; *Richmond v. Smith,* 117 Wis. 290, 293, 94 N. W. 35; *Harrigan v. Gilchrist,* 121 Wis. 127, 99 N. W. 909. This rule is not in conflict with the numerous holdings in this state that, under certain circumstances, the obtaining property from an incompetent or feeble-minded person will be presumed to have been accomplished by fraud or undue influence, for such cases rest on the view that the circumstances themselves prove the fraud unless its existence be negatived by other evidence. *Fox v. Martin,* 104 Wis. 581, 80 N. W. 921; *Loennecker's Will,* 112

Wis. 461, 88 N. W. 215; *Vance v. Davis,* 118 Wis. 548, 95 N. W. 939. Again, the attitude and responsibility of a stranger who merely receives moneys from a trustee or administrator, payment of which might be proper under some circumstances though improper under others, must not be confused with the attitude of the trustee himself when attempting to account for the same payments. In the latter case the burden rests on the custodian of the funds to justify his payment; not, indeed, to prove his innocence of fraud, but to establish affirmatively that he made the payment for which he seeks credit for the benefit of his trust. On such inquiry payments may be proper or improper, according as they are wise or unwise, and a trustee makes such at his own peril. They may be approved or disapproved upon his accounting, and he must abide the event. Not so, however, the recipient of such moneys who acts innocently, as he is presumed to do. The subject received full consideration in *Harrigan v. Gilchrist,* 121 Wis. 339, 99 N. W. 973, where we reversed a charge against third persons for moneys paid for their benefit, while we held the receiver liable to account for the same moneys. Neither must the situation now present be confused with that of a purchase by a trustee, either alone or in association with others, at his own sale of trust property, to which is applied the salutary rule that it still remains trust property if the beneficiaries so choose, no matter how complete the showing of good faith and absence of wrongful intent. *In re Taylor Orphan Asylum,* 36 Wis. 534, 550; *Hutson v. Jenson,* 110 Wis. 26, 40, 85 N. W. 689; *Harrigan v. Gilchrist,* 121 Wis. 330, 363, 99 N. W. 970, 982. Similar rules apply in case of appropriation of trust property or moneys to his own use by the trustee. *Hutson v. Jenson, supra.* Such are most of the cases cited by appellant. *Deobold v. Oppermann,* 111 N. Y. 531, 19 N. E. 94; *First Nat. Bank v. Nat. Broadway Bank,* 156 N. Y. 459, 51 N. E. 398; *Warren v. Union Bank,* 157 N. Y. 259, 51 N. E. 1036.

Turning now to the instant case, it cannot be doubted that an administrator not only may, but should under some circumstances, pay moneys of his estate in protection or preservation of property belonging to it; and, when he does so in good-faith belief in its propriety, neither he nor the recipient can be charged with fraud or other tort, although a court may disapprove the wisdom of the expenditure. The sum total of the facts proved is that among the property of plaintiff's estate was this interest in a mine expected to require, in protection or enhancement of its value, advances from time to time. Plaintiff, with knowledge of such facts, paid the money in question for that purpose, and defendants so received it and applied it. It was not diverted to the private use of the administrator, nor, in the fraudulent sense, to the use of the defendants, but was used for the supposed benefit of the estate. In this we confess our inability to discover any warrant for an inference of fraud or wrongful intent, or, indeed, of any wrong or injury to the estate, for there is nothing to suggest that the value of the property has not been enhanced to the full amount of the payments.

Appellant urges that an administrator can in no case engage in business or speculation on behalf of the estate; but, if he did so, his disbursements therein would hardly be disallowed him so far as they profited the estate, and certainly no damages in tort could be recovered from the person who received such moneys and gave full value for them, unless in so gross a case that it would be beyond reason to believe that he so received them otherwise than with intent to wrong the estate. Here there is no evidence that the payment was at all speculative. So far as the present proofs go, the mine may have been as stable and certain a property as a rentable building, and the payments as certain to benefit the estate as would be repairs on such a building necessary to preserve its rentability. It is entirely believable that the defendants received this money and expended it on the property in the

honest opinion that the welfare of the estate would be promoted thereby. If facts exist which would preclude such belief they have not been put in evidence. We therefore agree with the trial court that there was no evidence from which the jury could reasonably have drawn the inference of fraud or other wrong, nor convicted defendants of any tort.

By the Court.—Judgment affirmed.

J. L. GATES LAND COMPANY, Appellant, vs. OSTRANDER and others, Respondents.

February 2—February 21, 1905.

Contracts: Specific performance: Statute of frauds: Oral agreement for sale of lands: Part performance.

1. The plaintiff corporation having an option to purchase certain lands, an oral agreement was made between it and defendants' agent that defendants would purchase the lands from the owner and, after removing the timber, convey them to plaintiff for a certain price stated in plaintiff's written offer, which, with the oral agreement, was to be submitted to one of the defendants personally for acceptance. The written offer was retained by said defendant but never accepted in writing. Acting upon the oral agreement with the agent, plaintiff relinquished its option to purchase the lands. Plaintiff knew that the agent had no authority to purchase lands for defendants as contemplated by that agreement. The lands were then purchased by defendants, who afterwards refused to convey to plaintiff. *Held*, that there was no completed contract between the parties of which specific performance could be enforced.
2. Plaintiff's relinquishment of its rights under the option to purchase, before the proposed oral agreement had been accepted, was not an act of part performance under and in pursuance of an agreement with defendants so as to constitute a basis for enforcing specific performance.
3. There being facts from which the inference is legitimate that plaintiff may have relinquished its option because it did not intend to purchase the lands upon the terms thereof, such re-

linquishment cannot be held clearly and exclusively referable to, and done in pursuance of, the oral agreement, so as to warrant the enforcement of specific performance.

APPEAL from a judgment of the circuit court for Gates county: JOHN GOODLAND, Judge. *Affirmed.*

This is an action by the plaintiff, a corporation of this state, to enforce the specific performance of a parol contract to convey real estate. The complainant alleges that it made a contract with the defendants to purchase certain lands and that defendants now refuse to convey the lands covered by its terms. The complaint sets out that plaintiff in the year 1900 was engaged in the business of buying and selling wild lands in northern Wisconsin which were suitable for agricultural purposes; that it procured an option from the French Lumbering Company, of Ingram, Wisconsin, upon a large tract of timber land owned by that company, which option entitled plaintiff to purchase said property at a stated price; that, with the view of securing the lands in the form of stump lands, it secured to itself, for a limited time, control of the sale and disposition of these lands to such other parties as it might select; that in the month of November, 1900, one *E. D. Van Etten,* acting as agent of the defendants in the purchase of suitable tracts of timber in Wisconsin, with a view of conducting a lumber business, negotiated with plaintiff to secure the timber on the lands covered by plaintiff's option upon the French Lumbering Company's lands; that with plaintiff's consent *E. D. Van Etten* negotiated with the lumbering company for the purchase of its entire property, consisting of lands, a town plat, stock of merchandise, buildings, and improvements, situated at Ingram, Wisconsin, and obtained an offer from the lumbering company to sell all this property to defendants at a specified price, upon the condition that plaintiff would agree to purchase the lands at a satisfactory price after the merchantable timber had been removed, which contract he, as agent, approved and

accepted subject to defendants' approval; and that this oral contract so made by *E. D. Van Etten,* acting for his principals, and plaintiff, acting through its president, J. L. Gates, on November 13, 1900, was as follows:

"(1) That the said plaintiff would relinquish its interest in said lands, and notify the said French Lumbering Company thereof, and give the latter company authority to go on and complete a sale and transfer of said property to the parties in whose interests the said *E. D. Van Etten* was acting as aforesaid.

"(2) That said plaintiff should execute and deliver to said *E. D. Van Etten,* for the benefit of his principals, and that the said *E. D. Van Etten* should accept, for his principals, a writing of the purport and effect of the written agreement of *James L. Gates Land Company,* bearing date on that day, and hereinafter set forth in full.

"(3) That the principals of said *E. D. Van Etten,* in consideration thereof and of the said relinquishment of the plaintiff, would, as soon as the said French Lumbering Company transferred to them the property aforesaid, so as to enable him or them to execute to the plaintiff a contract for the conveyance to it of the property described in said written agreement of the plaintiff, execute and deliver to the plaintiff such contract for the conveyance thereof to the plaintiff upon the terms therein mentioned."

The complaint further alleges that in pursuance of and as performance upon its part of the terms of said oral agreement, the said plaintiff immediately notified the French Lumbering Company aforesaid that the plaintiff relinquished its interest in said lands, and executed and delivered to the defendant *E. D. Van Etten,* for the benefit of his principals, the written agreement hereinbefore referred to, and of which the following is a copy:

"Chippewa Falls, Wis., Nov. 13, 1900.

"*Mr. E. D. Van Etten:*

"In consideration of your purchase of the French Lumbering Co.'s lands and plant at Ingram, Wis., consisting of 147½ forties of land, we hereby agree to take said land off your

hands as soon as you get the timber off, and pay you for said land at about the rate of $2.60 per acre; that is, we will take all the land leaving you the town site and all improvements thereon, paying you the sum of fifteen thousand ($15,000.00) dollars for the said land consisting of about six thousand acres in Townships 35, 3 West, 35, 4 West, 36, 3 West, 36, 4 West.

"Respectfully, J. L. GATES LAND CO.

"By J. L. GATES, President."

It is further alleged that *E. D. Van Etten* accepted for defendants the above written memorandum of November 13, 1900, on the day it bears date, and that he immediately transmitted and delivered it to *H. A. Ostrander,* one of the defendants, who retains and now holds it, and who, by virtue of it and the surrender of plaintiff's option from the French Lumbering Company, was enabled to and did make on November 15, 1900, an executory contract with the French Lumbering Company for the purchase of the lands covered by the option, and who consummated the purchase on November 30, 1900, by acquiring all the title and interest in and to these lands for the benefit of the defendants.

The complaint further sets forth that the interest held by plaintiff under the option so relinquished was of great value, namely, the sum of $15,000, which sum formed the consideration of the agreement under which defendants agreed to convey to plaintiff the title to the stump lands so acquired by it from this lumber company, and that defendants now refuse to comply with the terms of this parol contract, notwithstanding the fact that the timber has been cut and removed from large tracts of these lands; that plaintiff has tendered full performance of such agreement on its part; and that defendants' refusal to comply with this contract will operate to the great and irreparable injury of plaintiff. It therefore asks that the contract be enforced specifically, and, in so far as such relief cannot be granted by reason of defendants' acts in the matter, that the court grant such other equitable relief as may be found just.

Upon the hearing of the case in the trial court it was stipulated as a fact that defendants had never, in writing, accepted plaintiff's offer of November 13, 1900, and the complaint was deemed amended to that effect. No evidence was received in the case, and judgment dismissing the action was awarded by the court. From this judgment plaintiff appeals.

For the appellant there was a brief by *Ryan, Hurley & Jones,* attorneys, and *John Barnes,* of counsel, and oral argument by *M. A. Hurley.*

W. M. Bowe, for the respondents.

SIEBECKER, J. The object of the action is to enforce specific execution of an alleged parol contract for the sale of lands. It is averred that the defendant is precluded from insisting upon the statute providing that "every contract . . . for the sale of any lands or any interest in lands shall be void unless the contract or some note or memorandum thereof, expressing the consideration, be in writing and be subscribed by the party by whom . . . the sale is to be made or by his lawfully authorized agent" (sec. 2304, Stats. 1898), for the reason that the plaintiff has in part performed the agreement.

The material facts relied on are that plaintiff had an option to purchase the lands from the French Lumbering Company, the owner of them at the time the alleged agreement was made; that one *E. D. Van Etten,* as agent of the defendants, made a parol contract with plaintiff whereby it was agreed that defendants should purchase these lands from the French Lumbering Company upon the terms and conditions of an offer the lumbering company had made to *Van Etten* as agent of defendants; that, as soon as defendants had removed the merchantable timber therefrom, the lands should be conveyed to plaintiff at the price specified in plaintiff's written offer for the purchase of these lands from defendants. It is further alleged that this agreement, with the offer of purchase, was to be submitted to the defendant *Ostrander* per-

sonally for acceptance; that he never accepted it in writing, but that he retains this written offer; that plaintiff, acting upon the agreement made with the agent *Van Etten,* relinquished its rights under the option then held by it for the purchase of the lands. The fact also appears that James L. Gates, acting as plaintiff's authorized officer, had full knowledge that *Van Etten* had no authority to purchase lands for defendants as contemplated by this agreement.

In actions for the specific performance of parol contracts for the sale of lands, the primary and fundamental requisites are that a contract be established possessing all the elements and features necessary to a specific enforcement, and that the contract sought to be enforced upon part performance be fully made and completed in all its terms except the written memorandum required by the statute. 1 Story, Eq. Jur. § 767; Pomeroy, Spec. Perf. secs. 110, 145; Pomeroy, Eq. Jur. § 1409, and note.

It is contended that the facts alleged show that a completed contract was entered into between plaintiff and defendants, whereby defendants agreed to convey the lands to plaintiff upon the terms specified. The facts alleged are that the agent of defendants entered into this contract for the sale of lands subject to his principals' approval, and that such agent delivered plaintiff's written offer for the purchase of these lands to defendants, but who neither personally nor through such agent assented to such proposed agreement. It is true defendants did not return the written memorandum of plaintiff's offer to purchase; but there was no express agreement that such retention of the memorandum should be an acceptance of the proposed contract, nor does it follow that such is the effect by necessary implication. As a matter of fact the parties made no agreement. The transactions between the plaintiff's president and defendants' agent, in legal effect, were no more than the preliminary negotiations for an agree-

ment, which failed of consummation by the refusal of defendants to accept it. If plaintiff, relying on the assurances of defendants' agent, acted on such preliminary agreement, it is no ground for invoking this form of equitable relief, which is only granted when it clearly appears that a contract has been, in all its elements, fully completed between the parties, except reducing it to writing. The facts alleged fail to establish that a contract for the purchase of these lands by plaintiff was ever accepted or agreed to by defendants, personally or by any authorized agent for them.

Under this state of the case plaintiff is not legally aided by the fact that the lands were subsequently purchased by defendants. Plaintiff relinquished its rights under the option for the purchase of these lands upon the proposed agreement as made between it and defendants' agent; its representative being at the time fully informed that the agent had no authority to buy lands for the defendants, and that the contract had not been approved or sanctioned by them. The relinquishment of plaintiff's option from the French Lumbering Company, under these circumstances, is not an act of part performance under and in pursuance of an agreement between plaintiff and defendants. It was in fact a prior act done in anticipation of the acceptance of the contract by defendants. Plaintiff's representative was bound to know whether a valid and completed agreement had been actually made between himself and defendants, except reducing it to writing, when the alleged act of part performance took place. The rule is that the acts of alleged performance must be obviously and solely done in reliance on, and under the obligations of, an established parol contract. *Park v. M., St. P. & S. S. M. R. Co.* 114 Wis. 347, 89 N. W. 532; 1 Story, Eq. Jur. § 762; Pomeroy, Spec. Perf. sec. 108; *Lydick v. Holland,* 83 Mo. 703.

Another fundamental requisite is that the part perform-

ance relied on for specific execution of the contract "must be clearly and exclusively referable to, and in performance of, its terms." If the alleged acts of performance are reasonably explicable upon some other grounds, then they are not sufficient to take the case out of the statute. Plaintiff insists that its relinquishment of its interest in these lands under the option was done solely with a view to the performance of this agreement. It is alleged, however, that the option contract obtained from the French Lumbering Company entitled plaintiff to purchase said property at an agreed price for a stated period of time, that the lumber company would not sell the timber separate from the lands, and that plaintiff was willing and ready to purchase the stump lands covered by the option. It is not alleged that plaintiff had decided to buy the lands with the timber thereon, under the option, but it is stated that it did not want the lands with the timber; clearly tending to negative a purpose to make such a purchase as the option contract provided. From these facts the inference is legitimate that it may have relinquished the option because it did not intend to purchase these lands upon the conditions of the option. Under such circumstances the relinquishment of the option cannot be held as clearly and exclusively referable to, and as done in pursuance of, the alleged contract for the sale of the lands between it and the defendants. As stated by Chancellor KENT in *Phillips v. Thompson,* 1 Johns. Ch. 131:

"It is well settled that, if a party sets up part performance to take a parol agreement out of the statute, he must show acts unequivocally referring to, and resulting from, *that* agreement—such as the party would not have done unless on account of that very agreement, and with a direct view to its performance. . . . There must be no equivocation or uncertainty in the case."

Plaintiff has failed to establish satisfactorily and clearly that an agreement for the sale of lands was made as claimed, and that the acts alleged as part performance are exclusively

referable to, and done in performance of, the alleged contract. The court ruled correctly in holding that the complaint does not state a good cause for the specific enforcement of an alleged contract for the sale of lands.

By the Court.—Judgment affirmed.

BURGSON, Appellant, vs. JACOBSON, Respondent.

February 2—February 21, 1905.

Deeds: Conditions subsequent: Conveyance by parent to child: Covenant: Breach: Equity: Reformation.

1. Conditions subsequent, especially when relied upon to work a forfeiture, must be created by express terms or clear implication, and are strictly construed.
2. In consideration, among other things, of natural affection and to avoid the expense of a will, a father conveyed land to his daughter, reserving a life estate with right of possession, and the daughter covenanted to pay all taxes. Upon her failure to pay taxes the land was sold therefor, and the father, to protect himself, purchased the tax certificates. *Held*, that the agreement to pay taxes would not be considered a condition subsequent for breach of which the father could re-enter and have the conveyance rescinded.
3. The daughter having offered to pay all the taxes with interest, before bringing an action to reform the conveyance as to a mistake in the description of the land, came into court in such action with clean hands, and the conveyance, not being a voluntary one but supported by a valuable consideration, might be reformed.

APPEAL from an order of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This action was brought for reformation of deed and to set aside and cancel tax certificates. The complaint sets up substantially the following facts:

First cause of action: In May, 1899, the defendant and

plaintiff entered into an agreement to the effect that defendant should convey to plaintiff, for the sum of $1 and other valuable considerations, the S. E. ¼ of the S. W. ¼ and W. ½ of the S. W. ¼, sec. 22, township 46, range 4 west, subject to covenants and reservations agreed upon; that in pursuance of this agreement, and on May 13, 1899, defendant executed and delivered to plaintiff a deed; that by mistake of scrivener the deed described the premises as the S. E. ¼ of the S. W. ¼ and W. ½ of the N. W. ¼, instead of the S. E. ¼ of the S. W. ¼ and the W. ½ of the S. W. ¼, sec. 22, township 46, range 4 west; that plaintiff demanded reformation from defendant, which was refused.

Second cause of action: That on May 18, 1897, for a valuable consideration, the defendant executed and delivered to Frank Burgson a deed of the W. ½ of the S. W. ¼, sec. 22, township 46, range 4 west, which deed was duly recorded; that said deed was subject to certain conditions and reservations; that on November 3, 1898, for a valuable consideration, Frank Burgson conveyed said land to plaintiff, which deed was duly recorded; that on May 13, 1899, for a valuable consideration, defendant conveyed to plaintiff the S. E. ¼ of the S. W. ¼ and W. ½ of the S. W. ¼, sec. 22, township 46, range 4 west, which deed was duly recorded; that in said deed defendant reserved the right of possession and rents and profits during his life, plaintiff agreeing to pay the taxes on said lands when due, and all future taxes, until the land might be sold by joint deed of the parties, and defendant in said deed released the W. ½ of the S. W. ¼, sec. 22, township 46, range 4 west, from conditions contained in deed thereof executed by him to Frank Burgson September 18, 1897; that defendant entered into possession of said lands May 13, 1899, and since has continued in possession and received the rents and profits; that on May 22, 1902, defendant took tax deed on said property for taxes of 1898; that on August 23, 1902, J. Yderstad took tax deed on part of said lands for taxes of

1898; that Yderstad was not the *bona fide* owner of certificate, but held same at request of defendant, and took same for defendant, and in accordance with his agreement, and without consideration, conveyed to defendant, which deed was recorded; that each forty so sold for taxes of 1898 was sold for $3.42, twenty-five cents of which was printing fee charged for advertising the sale, notice of which sale was published in a newspaper five times, once each week, the first publication being April 15th and the last May 13th, and the affidavit of publication was not made within six days of the last publication; that said deeds are null and void and a cloud upon the plaintiff's title; that plaintiff tendered to defendant the amount to which defendant was entitled by virtue of said tax deed, which was refused.

The defendant answered and also set up a counterclaim. Counterclaim is, in effect, as follows: That defendant on September 18, 1897, conveyed to his son-in-law, Frank Burgson, the N. E. ¼ of the S. W. ¼, N. W. ¼ of the S. W. ¼, and the S. W. ¼ of the S. W. ¼, sec. 22, township 46, range 4 west; that said lands were conveyed to Burgson, husband of only daughter and child of defendant, upon condition that defendant receive $30 per year and board during his natural life; that defendant, in lieu of a will, so conveyed said property in anticipation of having provided for him a home in his old age, and upon no other condition or consideration except natural affection for plaintiff, the wife of Frank Burgson, and that the property at his death should inure to the benefit of plaintiff and her husband; that Frank Burgson failed to comply with the terms of said agreement and deed, upon breach of which defendant commenced action to recover title to the lands so conveyed, and it was afterwards agreed that deed be canceled and a new deed executed by defendant to plaintiff containing the condition and agreement that defendant retain life estate in said lands with right of possession and plaintiff pay all taxes that should be assessed against said lands as

soon as due and payable, whereupon defendant executed and delivered deed mentioned in complaint to plaintiff, the consideration for said deed, among other things, being the natural affection of defendant for his child, and in order to avoid the expense of making a will and the probate thereof; that plaintiff utterly neglected and failed to pay the taxes by her agreed to be paid, and has allowed said lands to be sold for taxes and tax certificates taken up by other parties; that, in order to prevent loss of the property, defendant has purchased the tax certificates, and on account of the failure of plaintiff to fulfil her part of agreement and condition in deed defendant has elected and desires to cancel and rescind same and quiet and establish title in himself; that the lands constitute the only property and means of support of defendant, except a small amount of personal property. Demand of judgment that title be quieted and established in defendant.

Plaintiff demurred to counterclaim, which was overruled. From the order overruling demurrer this appeal was taken.

The cause was submitted for the appellant on the brief of *Sanborn, Lamoreux & Pray,* and for the respondent on that of *Tomkins, Tomkins & Garvin.*

KERWIN, J. The principal question involved upon this appeal is whether the counterclaim states a cause of action. From the facts stated it will be seen that the gist of the counterclaim is that defendant first conveyed his property to his son-in-law, Frank Burgson, in order to provide himself a home, and in consideration of natural affection for plaintiff, and so that the property at his death might inure to her benefit, his son-in-law agreeing to pay him $30 a year and board during his natural life; that in default of payment an action was commenced by defendant, which resulted, by agreement, in the cancellation of the deed to his son-in-law, Frank Burgson, and the execution of a new deed to plaintiff, by the terms of which defendant reserved a life estate with right of possession, and plaintiff agreed to pay the taxes; that the plaintiff

failed to pay the taxes by her agreed to be paid, allowed the lands to be sold for nonpayment of taxes, and defendant, to protect himself, purchased the tax certificates, and now asks for cancellation of the deed to plaintiff on the ground that she has breached her agreement. This claim is made by the defendant, as we understand counsel, upon the theory (1) that the agreement to pay taxes, under the circumstances, was a condition subsequent, upon the breach of which defendant was entitled to re-enter and rescind the conveyance; and (2) that the plaintiff's complaint does not state a cause of action, and on demurrer judgment should go against the party whose first pleading is bad.

1. Conditions subsequent, especially when relied upon to work a forfeiture, must be created by express terms or clear implication, and are strictly construed. 2 Washb. Real Prop. (4th ed.) 7 (*447). No express condition is pleaded, nor do we think any can be implied from the facts stated. It is true that a condition subsequent may be implied though none is expressed, but the facts must be such as leave no doubt in the mind of the court that one was intended and necessary to carry out the obvious intention of the parties.

The cases in this court relied upon by counsel for respondent do not support his contention. In *Delong v. Delong,* 56 Wis. 514, 14 N. W. 591, there was an express condition subsequent. All the other cases relied upon, notably *Glocke v. Glocke,* 113 Wis. 303, 89 N. W. 118, where the obligation in form rested in covenant and not in condition, hold that equity will grant relief by declaring a rescission of the conveyance, because a substantial part of the consideration for the transfer was an agreement to perform personal services and care, for a breach of which the grantor might re-enter and be restored to his former estate. In *Wanner v. Wanner,* 115 Wis. 196, 91 N. W. 671, Mr. Justice WINSLOW said:

"In such cases it has become the settled doctrine of this court that, when it appears that a substantial part of the consideration for the transfer was the agreement on the part of

the son to render to the parent personal services and care, this agreement will be treated by a court of equity as a condition subsequent, and, if it be substantially broken through fault of the son, a reversion of title will take place by re-entry or its equivalent, and the deed will be set aside."

In this class of cases the obligation is held to be a condition subsequent, because from the nature of the contract the parties must have intended to create a condition subsequent, since otherwise upon a breach the purpose of the agreement would be defeated and the grantor have no adequate remedy. The question is fully discussed by Mr. Justice MARSHALL in *Glocke v. Glocke,* 113 Wis. 303, and at pages 320, 321 (89 N. W. 124, 125) it is said:

"In such cases, if the purpose of the agreement substantially fails of realization, nothing short of a restoration of the original status as to the property involved is an adequate remedy. So nothing short of that could be reasonably said to have been in the minds of the parties at the inception of their contract as the consequence that might follow from a breach of it. In that situation 'a condition subsequent arises by clear implication.' "

Respondent claims that the facts set up in the counterclaim bring him within the rule of *Glocke v. Glocke, supra.* But in the case at bar the obligation on the part of the grantee is in form a covenant, and compensation for a breach can be measured in money. There is no ground for implying a condition subsequent, and none can be implied. The breach complained of is a failure to pay money—the taxes—and the counterclaim alleges that on account of the failure of the plaintiff to fulfil her part of the agreement in said deed the defendant elects to set aside and cancel the deed. There is no attempt to set up any grounds for equitable relief except the failure to pay taxes and that the land has been sold for taxes and certificates bought in by defendant. There is no allegation that plaintiff is insolvent, or that she was guilty of any fraud or bad faith in allowing the lands to be sold for taxes, or that defendant will suffer irreparable injury or will

be prevented in the future from reaping the fruits of the agreement, or that he has no adequate remedy at law, or any other facts showing that defendant is entitled to cancellation of the deed. The tax certificates are owned by defendant, and the plaintiff offered to pay them, with interest, before commencement of this action. In fact, as we understand respondent's counsel, his principal claim for rescission is upon the ground that the agreement to pay taxes is a condition subsequent, for a breach of which defendant can re-enter and have a rescission of the deed, under the rule of *Glocke v. Glocke, supra.* This position, we think, cannot be sustained.

2. It is also contended by counsel for respondent that plaintiff does not come into court with clean hands, because she failed to pay taxes. But plaintiff offered to pay the taxes and perform on her part before bringing this action. She was therefore not in default when the action was brought. So far as appears from the record, the failure to pay taxes may have been by mistake or inadvertence, and, plaintiff having tendered performance before action, it would not be doing equity to turn her out of court and forfeit her estate because at some time she had been in default. After tender of performance she is in court with clean hands, prompt and eager to perform. The deed in question is not a voluntary conveyance within the rule that equity will not interfere to enforce a voluntary contract to convey, or to reform a defective one. But in the case at bar we are dealing with a valid deed supported by a valuable consideration. The complaint alleges that the deed was made upon a valuable consideration, and the facts set up in the counterclaim support this. The contention, therefore, that the demurrer should be overruled because the complaint does not state a cause of action is untenable. We conclude, therefore, that the court below erred in overruling the demurrer.

By the Court.—The order of the court below is reversed, and the cause remanded with instructions to sustain the demurrer.

TOWN OF VAUGHN, Respondent, vs. TOWN OF MONTREAL, Appellant.

February 2—February 21, 1905.

Towns: Division: Apportionment of "indebtedness then incurred:" Water rentals.

Where, prior to the formation of a new town from a part of a town already organized, the latter had contracted to pay a certain sum annually to a water company for hydrant rentals, such rentals accruing after the division of the town were not, at the time of such division, any part of "the indebtedness then legally incurred" by the old town, within the meaning of sec. 672, Stats. 1898, providing for apportionment of such indebtedness.

APPEAL from an order of the circuit court for Iron county: JOHN K. PARISH, Circuit Judge. *Reversed.*

The complaint in this action alleged, in substance, the following facts: In 1890 the plaintiff town entered into a contract with the Hurley Water Company by which it agreed to pay the water company $4,000 a year for hydrant rentals and water service for a period of years. In 1900 the defendant town was organized out of a portion of the territory of plaintiff town, and the county board, by the ordinance of division, determined that the defendant town should be chargeable with 23.15 per cent. of the indebtedness of the old town. Subsequent to such division the plaintiff town paid out $16,333.33 for hydrant rentals under such contract, and it now brings this action to recover 23.15 per cent. thereof, viz., $3,781.06, from the defendant town, as the share for which the defendant is liable under such ordinance of division. The defendant demurred to the complaint. The court overruled the demurrer, and the defendant appeals.

For the appellant there was a brief by *Lamoreux & Shea,* and oral argument by *W. F. Shea.* They argued, among

other things, that such a contract as that here involved does not create any debt. It is not the contract, but the performance of the service under it, which gives rise to the debt. *Herman v. Oconto,* 110 Wis. 660, 672–674; *Stedman v. Berlin,* 97 Wis. 505, 511, 512; *Smith v. Dedham,* 144 Mass. 177, 10 N. E. 782; *Crowder v. Sullivan,* 128 Ind. 486, 28 N. E. 94; *Ludington W. S. Co. v. Ludington* (Mich.) 78 N. W. 558; *Saleno v. Neosho* (Mo.) 27 L. R. A. 769; *Cunningham v. Cleveland,* 98 Fed. 657; *Weston v. Syracuse,* 17 N. Y. 110; *Beard v. Hopkinsville* (Ky.) 44 Am. St. Rep. 229–243, 23 L. R. A. 405, notes; *Whitney Arms Co. v. Barlow,* 68 N. Y. 34; *Wood v. Partridge,* 11 Mass. 488, 493.

For the respondent there was a brief by *Geo. C. Foster,* attorney, and *R. Sleight,* of counsel, and oral argument by *Mr. Foster* and *Mr. Sleight.* They contended, *inter alia,* that in sec. 672, Stats. 1898, the legislature plainly had in mind debts to become due as well as debts already due, for it provides for payment of the new town's proportion of the indebtedness *"at such times as the same shall become payable."* Note, also, the use of the term "indebtedness" in sec. 944. Had the intention been otherwise, the term used in sec. 672 would not have been "indebtedness then legally *incurred*" but "indebtedness then legally *due.*" See *Knight v. Ashland,* 61 Wis. 233, 245; *Hensley v. People,* 84 Ill. 544; *In re Lambie's Estate,* 94 Mich. 489; *U. S. Blowpipe Co. v. Spencer,* 40 W. Va. 698.

WINSLOW, J. Sec. 672, Stats. 1898, provides as follows:

"Whenever the county board shall form a new town from parts of a town or towns already organized they shall, by their ordinance of division, determine what portion of the indebtedness then legally incurred by such old towns shall be chargeable to the respective portions so detached to form such new town; and such new town shall pay the proportion of such indebtedness so declared chargeable to such detached portions at such time as the same shall become payable; and

for that purpose the town board of such new town shall levy a tax upon all the taxable property of such portions thereof so chargeable therewith."

The only question presented upon this appeal is whether the annual hydrant rentals falling due after the division constitute "indebtedness then legally incurred," i. e., at the time of the division. It seems to us entirely clear that this question must be answered in the negative. This court has held, after careful consideration and review of the authorities, that such payments falling due upon the rendition of services in the future, though fixed by the terms of an existing contract, do not constitute "existing indebtedness," within the meaning of sec. 3, art. XI, of the state constitution, which prohibits any municipal corporation from becoming indebted to an amount, "including existing indebtedness," exceeding five per centum of its taxable property. *Stedman v. Berlin,* 97 Wis. 505, 73 N. W. 57; *Herman v. Oconto,* 110 Wis. 660, 86 N. W. 681. Possibly by some refined reasoning a distinction might be drawn between the terms "indebtedness existing" and "indebtedness incurred," but for all practical purposes they seem to be synonymous. A debt which exists must have been incurred, and, on the other hand, if it has been incurred, and has not been in some way discharged, it exists. While the contract to pay hydrant rental in the future as water is furnished is a contract obligation, no indebtedness accrues until the water has been furnished, and the statute speaks not of contract obligations in general, but of contract obligations which have become indebtedness.

By the Court.—Order reversed, and action remanded with directions to sustain the demurrer to the complaint.

WASHBURN LAND COMPANY, Appellant, vs. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Respondent.

February 2—February 21, 1905.

Tax deeds: Form: Compliance with statutory requirements: Record.

1. Substantial adherence to the statutory form of tax deed is all that is necessary; but the omission of any material requirement of that form, which is not supplied by necessary inference from the other parts of the deed, is a fatal defect.
2. When the opening recital in a tax deed, as to whether the applicant therefor presented himself as the purchaser at the tax sale or as assignee of the certificate, contradicts the later part where the name of the purchaser is required to appear, the instrument fails to show with reasonable certainty who was in fact such purchaser and that the applicant for the deed was entitled thereto, and is fatally defective.
3. A recital in a tax deed that the tax sale was made at the office of the county treasurer in Bayfield county, sufficiently shows that the sale was at a public place at the seat of justice of the county, as required by sec. 1130, Stats. 1898.
4. A tax deed covering a large number of tracts consisted of several printed forms attached together, all the printed portions except that preceding the space for description of land in the first form and that following said space in the last form being erased so as to leave sufficient space for writing in all the descriptions. *Held*, that this did not render the deed defective nor the record thereof, in similar form, insufficient.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

Action to quiet title to real estate. Plaintiff's title was based on a tax deed. The case turned on whether such deed was void upon its face. The decision was favorable to the defendant and judgment was rendered in its favor. The findings are, in substance, these:

The deed was in the statutory form, except in the following particulars: The instrument recited that A. C. Probert, assignee of Bayfield county, deposited the certificates, etc.,

while at the proper place for specifying the name of the purchaser at the tax sale occurred the statement that such purchaser was A. C. Probert. The deed recited that the sale was made at the county treasurer's office in Bayfield county. It contained 151 descriptions. The record thereof in the office of the register of deeds of Bayfield county was made, in the book of printed forms in use for the recording of such deeds, by using eight of such forms. The printed portion of the first form preceding the blank space for descriptions was filled up properly. The printed portion of such form after such space was erased by making a red cross over the same. All of the printed portions of the succeeding six forms and the printed portion of the eighth form preceding the space designed for descriptions were erased in like manner. In the blank spaces in the eight forms designed for descriptions those in the deed in question were written, and the printed part of the eighth form following the space designed for descriptions was properly filled up. Excluding all those portions of the several forms erased, what was left, so far as concerns the erasures, constituted a complete copy of a valid tax deed.

A. W. McLeod, for the appellant.

For the respondent there was a brief by *Tomkins, Tomkins & Garvin,* and oral argument by *W. M. Tomkins.*

MARSHALL, J. At the trial respondent claimed the tax deed to be fatally defective on its face in three particulars. While the disposition of this appeal requires consideration of but one of them it seems best to refer briefly to each.

At the outset it must be kept in mind that while the statute prescribes the form to be used in making a tax deed, and adherence thereto with considerable strictness has been uniformly held to be necessary, neither by its terms nor as construed by the decisions does the statute call for strict compliance. Substantial compliance is all that is required. Sec.

1178, Stats. 1898; *Hunt v. Stinson,* 101 Wis. 556, 77 N. W. 901. What constitutes such compliance is not always easy to determine, and the decisions are not in the most perfect harmony in respect thereto. There was an effort made in *Hunt v. Stinson, supra,* to bring them together and to weed out uncertainties, but it seems without entire success. The decisions to the effect that an omission from a tax deed of any material feature of the statutory form is fatal thereto were firmly adhered to, but at the same time it was shown that a somewhat more liberal rule governs the matter than would seem to be the case from a reference to some of the early decisions. Those declaring that the omission of a material feature of the statutory form, rendered harmless by other parts of the deed, in that the real fact designed to be shown by the omitted feature is suggested by necessary inference from other parts of the deed, does not affect the validity of the instrument, were approved. It was said that omissions and blunders that do not prejudice or deceive any one or affect the substance of the conveyance do not militate against the rule of substantial accuracy required by the statute. That was said to be the rule of *Austin v. Holt,* 32 Wis. 478; *Orton v. Noonan,* 25 Wis. 672; *Cousins v. Allen,* 28 Wis. 232; *Hotson v. Wetherby,* 88 Wis. 324, 60 N. W. 423; *Milledge v. Coleman,* 47 Wis. 184, 2 N. W. 77; and that they were consistent with *Krueger v. Knab,* 22 Wis. 429; *North v. Wendell,* 22 Wis. 431; *Eaton v. Lyman,* 33 Wis. 34. Doubtless it is true that such cases are in harmony as regards stating the general principle, but they are not in all respects in harmony in the illustrations they afford of its scope.

The statutory form has three significant features material to this case. In the opening lines it requires the deed to show whether the applicant therefor presents himself as the original owner of the certificate or as assignee. This arrangement of words is used in that regard: "Whereas, ——— (or assignee of ———) has deposited," etc. There can be no

mistaking the legislative purpose thereof. After the blank space designed to be filled up with the descriptions, and in as close connection therewith as practicable, there is a blank to be filled up with the name of the purchaser at the tax sale. It would seem, as an original proposition, that the legislative purpose was to have the deed show upon its face whether the applicant was the person entitled to receive the same, either as original holder of the tax certificate or assignee, and whether the purchaser at the tax sale was a person competent to purchase. Preceding the feature last mentioned there are blanks designed to be filled up so as to show that the lands were sold at the place required by sec. 1130, Stats. 1898, this arrangement of words being used to that end: "For the nonpayment of taxes, sold by the ——— at public auction at ———, in the county of ———, on the ——— day of ———, in the year of our Lord one thousand eight hundred and ———, to the said ———," etc.

As indicated in the statement the first statutory requisite in the deed in question was responded to in this wise: "Whereas, A. C. Probert, assignee of Bayfield county, has deposited," etc., while the blank space specially designed for the name of the purchaser was filled up by writing in "A. C. Probert." It is claimed that thereby A. C. Probert is declared to be assignee of Bayfield county of the certificate, and also the purchaser at the tax sale, so that no one can tell to a reasonable certainty who in fact was such purchaser, or whether Probert was in fact the person entitled to receive the deed, thus rendering it void upon its face. The court, it seems, so held, following *Dunbar v. Lindsay,* 119 Wis. 239, 96 N. W. 997. Respondent insists that such case is the ruling authority on the question presented, while appellant confidently insists that a similar defect was distinctly declared to be immaterial in *Austin v. Holt,* 32 Wis. 478; that the decision has stood the test of over twenty-five years without having been criticised, unless it be in *Dunbar v. Lindsay,* and

that the latter case is distinguishable from the former. The late case was based on *North v. Wendell, supra,* which was ruled by a case decided substantially at the same time. *Krueger v. Knab, supra.* Such late case and the two earlier ones seem to be in substantial harmony, while the former seems to be out of harmony with *Austin v. Holt, supra,* upon which counsel relies. That case was not referred to in *Dunbar v. Lindsay,* and *Krueger v. Knab* and *North v. Wendell* seem to have been both overlooked when *Austin v. Holt* was decided, while at the next term after the decision in *Austin v. Holt, Eaton v. Lyman, supra,* was decided, in which *Austin v. Holt* was not referred to, but the two earlier cases were and approved. When we came to *Hunt v. Stinson, supra,* having in mind only the general principle that substantial compliance with the statutory form is all that is required, it was said that all the cases mentioned were in harmony. Later in *Dunbar v. Lindsay, supra, North v. Wendell, Eaton v. Lyman,* and *Hunt v. Stinson* were cited and followed as ruling authorities.

More detailed reference to the above mentioned cases is necessary in order to determine definitely the points of conflict between them, and which should be regarded as ruling the proposition under consideration. We must make the examination, keeping in mind the general principle stated that the omission of a material requirement of the statutory form, which is not supplied by necessary inference from the other parts of the deed, is a fatal defect. The court gave a very wide range to that doctrine in *Hunt v. Stinson.* While approving previous decisions to the effect that a tax deed must show who was the purchaser at the tax sale, and whether the applicant for the deed was the one entitled to receive the same, either as such purchaser or as assignee, the court held that where there has been a succession of assignees the omission to state them, showing a chain of title reaching from the purchaser at the sale to and including the applicant for the deed,

is not material if the deed shows that the applicant deposited the certificate as assignee, since that, by implication, states that he holds the same by title derived from the original purchaser, either direct or through a succession of assignments.

In *Krueger v. Knab, supra,* the opening recital in the deed was in these words: "Whereas, Edward Krueger, of the city of Milwaukee, has deposited," etc., suggesting by necessary inference that Krueger was the purchaser at the tax sale. At the proper place for specifying by express words who was such purchaser it was given as the "city of Milwaukee." Thus the inference at the start was rebutted by such express statement, leaving nothing to show whether Krueger was entitled to receive the deed or not, and it was held to be fatally defective.

What form of deed was used in *North v. Wendell, supra,* we are unable to state. The cases and briefs used upon the argument are not within our reach. The facts in regard to the other cases are obtained partly by reference to the printed cases and briefs, and partly by reference to the published decisions. It is assumed from language in *North v. Wendell* that the deed there was in precisely the same form as in *Krueger v. Knab.*

In *Austin v. Holt* the opening recital was in these words: "Whereas, Herman Johnson, assignee of Oconto county, has deposited," etc., and in the proper place for the name of the purchaser at the tax sale were written the words "Oconto county." Later at the end of the recital, where there was no blank required to be filled up, and following the words "aforesaid purchaser" which were designed in the form to refer back to the name previously written in the blank, the name "Herman Johnson" was written so that the deed read this wise: "Sold . . . to the said Oconto county . . . the whole of which sum of money has been paid by the aforesaid purchaser, Herman Johnson." The court said that the interpolation was an obvious and harmless mistake; that it corrected itself when

read in connection with other parts of the deed, since they showed distinctly that the purchaser at the tax sale was Oconto county, and that Herman Johnson presented himself as the proper party to receive the tax deed as the assignee of said county. The matter was disposed of in a very few words without any reference being made to previous decisions of the court. Since the name "Herman Johnson" was industriously added to the printed form where there was no call for any writing to appear, the reasonable probability was, it would seem, that Johnson was the purchaser. One would think that the person who draughted the deed must have made the interpolation much more considerately than he filled the blank. We cannot see that the decision is in harmony with *Krueger v. Knab,* 22 Wis. 429, and *North v. Wendell,* 22 Wis. 431.

In *Dunbar v. Lindsay,* 119 Wis. 239, 26 N. W. 997, the opening recital was the same as in *Krueger v. Knab.* When it came to the statement of who was the purchaser at the tax sale the blank was filled up consistent with what had preceded, the same as in *Austin v. Holt,* 32 Wis. 478; then, as in that case, there was an interpolation made, which was in its entirety a departure from the statutory form, viz.: "Whereas it appears, as the fact is, that the aforesaid certificates have been duly assigned by the said ——— to the said William Lindsay." So the deed at the outset spoke of William Lindsay, inferentially, as the purchaser at the tax sale. Later at the proper place he was said to be such purchaser, and by the added clause he was said to be the holder of the certificates from some unnamed party. It will be seen that the defect was more like that in *Austin v. Holt* than that in *Krueger v. Knab* and *North v. Wendell.* The court held that it was fatal, on the authority of the last two cases and *Hunt v. Stinson,* 101 Wis. 556, 77 N. W. 901, which had been recently decided.

Now here we have a case where the opening statement of the deed is inconsistent with the name of the purchaser at the tax sale, where that is required to be expressed. The two fea-

tures are not in harmony followed by an inconsistent clause, as in *Austin v. Holt* and *Dunbar v. Lindsay,* but the blank space for the name of the purchaser is so filled as to be inconsistent with the opening recital. The defect, though not of the nature of that in *Krueger v. Knab,* is such a near approach thereto that there is no escaping the conclusion that it is fatal, because the name of the purchaser at the tax sale is not definitely stated in the deed, as designed by the statutory form, and does not otherwise appear by necessary inference, and the same doubt exists in respect to whether the applicant for the deed was entitled to receive the same, unless we are to overrule *Krueger v. Knab, North v. Wendell, Dunbar v. Lindsay,* and *Hunt v. Stinson.* It seems that the want of harmony in the decisions to which we have referred is caused by failure in *Austin v. Holt* to properly apply the principles of preceding cases. That case should not rule regardless of whether it is right or not as an original matter, upon the ground that it has become a rule of property, since it does not seem to have been followed, but rather to have been discredited from very soon after it was decided to the present time, although not by direct reference.

From the foregoing we deduce this: When the opening recital in a tax deed, as to whether the applicant therefor presented himself as the purchaser at the tax sale, or as assignee of the certificate, contradicts the part where the name of the purchaser is required to appear later in the deed, the instrument fails to show with reasonable certainty who was in fact such purchaser and that the applicant for the deed was entitled thereto, and is fatally defective.

The suggestion that the deed is void because the recital therein is to the effect that the tax sale was made at the office of the county treasurer in Bayfield county, instead of at the county seat of such county, does not seem to have merit. Sec. 1130 provides that a tax sale must be held at the seat of justice of the county. The form contains a blank designed to

be filled up so as to show that fact by this arrangement of words: "Sold . . . at public auction at ———, in the county of ———." Obviously any method adopted for filling the blank spaces which will, by necessary inference, indicate compliance with sec. 1130, Stats. 1898, is all that is required. Since the office of the county treasurer must necessarily be at the county seat, to state that the sale was conducted at the county treasurer's office in the county is equivalent to stating that it was conducted at a public place at the seat of justice of the county.

The claim that the record of the deed is defective and shows that the instrument was also because, for convenience, several forms were attached together, all the printed portions, except that preceding the blank space for writing in descriptions in the first form, and that following it in the last form, being erased so as to leave sufficient space to write all the descriptions, hardly deserves more than passing notice. The parts erased, of course, form no part of the deed, nor of the record, and the parts left, aside from the fatal defect to which we have alluded, make a complete deed.

By the Court.—The judgment is affirmed.

NEVIUS, Respondent, vs. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellant.

February 2—February 21, 1905.

Railroads: Carriage of live stock: Injury from defect in car: Contract accepting car: Knowledge of defect: Court and jury.

1. A stipulation, in a contract for the carriage of live stock, whereby the shipper accepts the cars furnished by the carrier and acknowledges that they are sufficient and suitable in every respect, does not relieve the carrier from liability for injury resulting from its negligence in supplying unsuitable or defective cars.

2. The question whether plaintiff's agent knew, or was chargeable with knowledge, of a defect in the car in which plaintiff's horses were shipped, is *held*, upon the evidence, to have been one for the jury.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

Action for injury, necessitating the killing of plaintiff's horse, resulting from a defective condition of the freight car in which such horse was shipped. The shipping receipt contained stipulation that:

"The said shipper hereby accepts for transportation and acknowledges and admits the cars furnished by the railroad company to be sufficient and suitable cars in every respect for the shipment of said stock. . . . The car wherein the said stock is to be carried having been tendered to said shipper by the said railroad company for that purpose, the said shipper hereby agrees that such car . . . fit and proper for the purposes of such transportation."

At the close of the evidence defendant moved for a direction of verdict, which was denied, and upon a verdict in favor of the plaintiff judgment was entered, from which defendant brings this appeal.

For the appellant there was a brief by *Tomkins, Tomkins & Garvin,* and oral argument by *W. M. Tomkins.*

For the respondent the cause was submitted on a brief by *E. C. Alvord* and *H. E. Edwards.*

DODGE, J. The only error assigned is the refusal to direct a verdict for defendant. That is supported by contention that the defect in the car was so open and obvious that plaintiff's agent who loaded the horses must be conclusively presumed to have known of it, and, so knowing, was guilty of such contributory negligence as to preclude recovery; also that, because of such knowledge, plaintiff was bound by the stipulation in the shipping receipt accepting the car and assuming any risks from its condition. The inefficacy of such stipulation to relieve a carrier in case of negligence in supplying un-

suitable cars is well established by our decisions. *Abrams v. M., L. S. & W. R. Co.* 87 Wis. 485, 58 N. W. 780; *Loeser v. C., M. & St. P. R. Co.* 94 Wis. 571, 69 N. W. 372; *Leonard v. Whitcomb,* 95 Wis. 646, 70 N. W. 817. We need not discuss it. It suffices for the present case to say that we cannot agree with appellant's contention that plaintiff's agent must be presumed to have known of the defect in the car. That consisted of an old break of longitudinal boards such as to leave a hole near the car door about three feet long and six to seven inches wide. The agent testified he had no opportunity to inspect the car, as he had to load the horses in a hurry while the train was waiting, and that he had no knowledge of such or any defect. It does not appear whether the pieces of boards whose absence caused the hole were wholly displaced at the time of loading, nor that the horses were loaded on that side of the car, nor that the car was so situated that the side opposite from the loading chute was accessible for inspection. With such facts it surely is not beyond reason to credit the agent's denial of knowledge, or to hold such ignorance consistent with ordinary care. Hence those questions were properly for the jury. Since they have been resolved in favor of plaintiff, we need not consider whether a different finding would have constituted a defense.

By the Court.—Judgment affirmed.

EDWARDS, Appellant, vs. WISCONSIN INVESTMENT COMPANY, Respondent.

February 2—February 21, 1905.

Sale: Property included: Chattel mortgage: Parol evidence to explain bill of sale.

1. A bill of sale of property described as "a complete sawmill, consisting of [certain specified articles], together with all equipments and everything pertaining thereto or in any way con-

nected therewith," contained also the statement that the sale was made by virtue of a chattel mortgage "which covers the property which is sold or evidenced by this bill of sale." The description in the mortgage was substantially the same as in the bill of sale. *Held*, that the reference in the bill of sale to the mortgage did not restrict the property conveyed to that actually covered by the mortgage, so as to exclude equipment added to the mill after the mortgage was given.

2. Parol evidence of extrinsic facts was admissible in such case to show whether or not a bull chain and attachments, leased to the mortgagor after the mortgage was given and by him set up on the premises for use in connection with the mill, were included in the property described in the bill of sale.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

The defendant, a corporation, was engaged in a general loan business, and had obtained by assignment a mortgage upon certain property, described in the instrument as follows:

"A complete sawmill, consisting of one Brumard engine, carriage, rotary and husks, live rolls and edger, carriage and chains, one boiler, smokestack, together with all the equipments and everything appertaining thereto or in any way connected therewith . . . which said property . . . is now free and clear from any prior lien or incumbrance."

This mortgage was executed on October 28, 1901. On March 1, 1902, Raarup Bros. leased to the mortgagor a bull chain, with shafting and belting, used for hauling logs out of the water up to the saw. About the 1st of February, 1904, Mr. John F. Dufur, president, treasurer, and general manager of the defendant company, entered into negotiations with the plaintiff for the sale of the mill property. Plaintiff, at the request of Dufur, examined the mill property, and found the bull chain on the mill premises set up for use in connection with the property covered by the chattel mortgage. On February 16, 1904, Dufur executed a bill of sale, and left it with one Younker to be delivered to the plaintiff on payment of $250, the agreed price. Plaintiff, some weeks afterward,

paid the purchase price and received the bill of sale, which contains the following description of the property:

"A complete sawmill, consisting of one Brumard engine, carriage, rotary, husks, live rolls and edger, carriage chains, etc., one boiler, smokestack, together with all equipments and everything pertaining thereto or in any way connected therewith."

The bill of sale also contains the following:

"This sale is by virtue of a certain chattel mortgage, a copy of which is hereto annexed, and said sale is made in accordance with said mortgage, which . . . and covers the property which is sold or evidenced by this bill of sale."

Plaintiff had gone into possession of the property before he had obtained the bill of sale. Two days after receiving the bill of sale plaintiff was informed by one of the Raarup brothers of their ownership of the bull chain and the belting and shafting connecting it with the engine, and he paid them $125 for title to the property which was covered by their lease.

This action is brought under the bill of sale to recover the money so paid by plaintiff, and is founded on a breach of the warranty of title to the bull chain and the belting and shafting connecting it with the engine. The action was commenced in the municipal court for Ashland county, and resulted in a judgment for plaintiff. On the trial *de novo* in the circuit court, to which defendant appealed, plaintiff attempted to introduce evidence to the effect that the bull chain and attachments were included in the purchase and were covered by the description in the bill of sale, but the court rejected such evidence and held that no parol proof could be received to explain the terms of the bill of sale. At the conclusion of plaintiff's evidence, on defendant's motion, plaintiff was nonsuited and a judgment dismissing the action and for costs was entered in favor of defendant. This is an appeal from such judgment.

For the appellant there was a brief by *Sanborn, Lamoreux & Pray,* and oral argument by *A. W. Sanborn.*

For the respondent there was a brief by *Tomkins, Tomkins & Garvin,* and oral argument by *W. M. Tomkins.*

SIEBECKER, J. The question at issue between the parties is whether the bill of sale transferring "a complete sawmill, consisting of" specified parts and articles designated, "together with all equipments and everything pertaining thereto or in any way connected therewith," includes the articles described as a bull chain and the accompanying belts and gearing. The bill of sale contained the provision that:

"This sale is by virtue of a certain chattel mortgage, a copy of which is hereto attached, and said sale is made in accordance with said mortgage, which mortgage is on file in the office of the city clerk of the city of Ashland, Wisconsin, and covers the property which is sold or evidenced by this bill of sale."

It appears that the description in the bill of sale, besides including the parts of the sawmill covered by the chattel mortgage, may, if such be shown to have been the intention of the parties, include the bull chain and attachments which were connected with and used as part of the sawmill after the mortgage had been given but before the bill of sale had been executed. The court ruled that the provision of the bill of sale referring to the chattel mortgage operated as a limitation upon the prior provision, and limited the property actually sold to such articles as were covered by the chattel mortgage. We think this view conflicts with the intent of the parties as expressed in the instrument. The rule is that the provisions of an instrument transferring property must be construed most strongly against the vendor. If we give to the language of the provision describing the property conveyed its natural and ordinary significance, and seek to give the chattel mortgage clause a reasonable meaning in harmony with it, we are led to the conclusion that the property conveyed by the bill of

sale was not restricted to that which defendant might acquire under the mortgage. The reference to the chattel mortgage was evidently calculated to assure the vendee that the vendor had good title to all the property sold.

This leads us to the first inquiry suggested: Does the property described include the bull chain and attachments? The description of the property sold, besides enumerating some of the articles as parts of the sawmill, uses the language, "A complete sawmill," consisting of the specified articles, "together with all the equipments and everything pertaining thereto or in any way connected therewith" and located on the premises. We cannot determine, without the aid of extrinsic evidence, whether the bull chain and attachments were or were not a part of the "complete sawmill," or whether it was intended to include them in the description, "all the equipments and everything pertaining thereto or in any way connected therewith." The rule is well established that if terms are used in a transfer of personal property which show on their face that reference must be made to extrinsic facts to ascertain the intent of the parties, then such terms may be explained, or the property identified, by parol proof of the surrounding facts and circumstances. *Ganson v. Madigan,* 9 Wis. 146; *Weber v. Illing,* 66 Wis. 79, 27 N. W. 834; *Smith v. Coleman,* 77 Wis. 343, 46 N. W. 664; *Rib River L. Co. v. Ogilvie,* 113 Wis. 482, 89 N. W. 483; *Excelsior W. M. Co. v. Messinger,* 116 Wis. 549, 93 N. W. 459. It is therefore necessary to resort to the facts of and the circumstances surrounding the transaction to determine the dispute between the parties.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

WILMARTH and another, Respondents, vs. JOHNSON, imp., Appellant.

February 2—February 21, 1905.

Mortgages: Application of rents payable to mortgagee: Accounting.

1. By the terms of a lease of mortgaged premises the rents were to be paid to one of the mortgagees and by him applied on taxes, insurance, and the mortgage debt. After a year the rent was reduced, with the consent of the mortgagor. *Held*, that the mortgagees were not chargeable with the difference between the original and the reduced rental.
2. Out of the rents collected said mortgagee paid back insurance, back taxes, and bills for repairs. The mortgage provided that the property should be kept insured by the mortgagor. Said payments were made with the consent of the mortgagor for the purpose of preserving and keeping up the property and securing an income therefrom. *Held*, that the sums so paid should not be charged against the mortgagees.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

This action was brought to foreclose a mortgage on lot 8, block 1, city of Ashland, given by *Otto Johnson* and wife to J. S. Wilmarth and *Fred Miller Brewing Company* to secure $6,500, according to the terms of six promissory notes dated April 10, 1893, with interest at eight per cent. per annum; the last payable April 10, 1900. The complaint, which is in the usual form, was amended upon the trial so as to allege that J. S. Wilmarth had no interest; that *L. C. Wilmarth* was the party beneficially interested, and that $6,845.42 was due, with interest from May 3, 1902, to plaintiffs, from defendant *Otto Johnson;* that defendant John H. Burch has, or claims to have, a lien subsequent to the plaintiffs'.

Defendant *Otto Johnson* answered, and, among things, alleged that the *Fred Miller Brewing Company,* for a valuable consideration, reduced the rate of interest upon its one-half of the notes referred to in the complaint to six per cent.; that

the plaintiff *L. C. Wilmarth* was at the time of giving the mortgage, and thereafter continued to be, the general agent of J. S. Wilmarth and plaintiff *Fred Miller Brewing Company;* that on the 22d day of May, 1895, the mortgaged premises were leased to one M. W. Brown for five years at the annual rental of $1,500; that defendant *Otto Johnson* assigned all his interest in said lease to plaintiff *L. C. Wilmarth* for the benefit of the mortgagees, and that they agreed to collect the rent and apply the same to the payment of the notes and mortgage, and that, in pursuance of said agreement, plaintiff collected the rents due on said lease up to May 1, 1899; that on April 8, 1899, said defendant *Johnson* leased the premises to one Thomas Keneally for the term of three years from May 1, 1899, for the annual rental of $1,200, payment to be made to plaintiff *L. C. Wilmarth* and applied on taxes, insurance, and the mortgage indebtedness; that pursuant to said agreement plaintiff *L. C. Wilmarth* collected the amount due on said lease up to and including June 1, 1902; that on January 17, 1902, there was due on said notes and mortgage, after deducting rents turned over, no more than $3,000, and on said day said defendant *Johnson* tendered said amount to plaintiff *L. C. Wilmarth,* and demanded satisfaction of the mortgage, but that plaintiff refused to accept same or satisfy the mortgage, claiming that there was still due thereon $6,900.

Defendant Burch answered, setting up a second mortgage given by defendant *Johnson* to the *Fred Miller Brewing Company,* and afterwards assigned to him, to secure a note of $725, dated February 10, 1894, due one year from date, with interest at six per cent. per annum, no part of which had been paid; praying payment in case of surplus. Defendant *Johnson,* answering the cross-complaint of Burch, admitted the execution and delivery of the note and mortgage and alleged payment in full of the interest thereon.

The case was tried upon the issues thus formed, and the

court found in favor of the plaintiffs on all the material allegations of the complaint, and, among other things, found that plaintiff *L. C. Wilmarth* collected for and on account of the defendant *Otto Johnson* rents to the amount of $7,030, and paid of said sum at the request of defendant *Johnson,* and for his benefit, $3,186.63, and the remainder so collected, $3,843.37, was, by agreement between plaintiffs and defendant *Johnson,* applied on plaintiffs' mortgage indebtedness, and that no other payment was made on said indebtedness or interest; that there was due plaintiffs $7,124.26; that there was due defendant Burch on his note and mortgage $725, and interest at six per cent. per annum from February 10, 1895. As conclusions of law the court below found that the plaintiffs were entitled to judgment of foreclosure and sale to satisfy the amount due plaintiffs, with interest and costs, and that judgment be in the usual form, with order for deficiency judgment in case the proceeds of sale be not sufficient to satisfy judgment, with interest and costs, and that, if any surplus remain after payment of plaintiffs' judgment, the same be applied on the claim of defendant Burch on his cross-complaint.

Judgment was entered in accordance with the findings of fact and conclusions of law, from which this appeal was taken.

For the appellant there was a brief by *Tomkins, Tomkins & Garvin,* and oral argument by *W. M. Tomkins.*

For the respondents there was a brief by *Lamoreux & Shea;* and oral argument by *W. F. Shea.*

KERWIN, J. The only question litigated on the trial was the amount of plaintiffs' mortgage debt. The plaintiff *L. C. Wilmarth* had charge of the collection of rents under the Brown and Keneally leases, which rents were to be applied in payment of insurance and taxes on the mortgaged premises and the balance upon the plaintiffs' mortgage debt. The court below found that the plaintiff *L. C. Wilmarth* collected $7,030 and no more, and paid out at the request of defend-

ant *Johnson* $3,186.63 on his debts, and that the balance, $3,843.37, was, by agreement of plaintiffs and defendant *Johnson,* applied on the indebtedness to the plaintiffs mentioned in the complaint. It is contended, however, on the part of defendant *Johnson* that the plaintiff *L. C. Wilmarth* should have collected $2,625 more rent on the Brown lease, and that, because he failed to do so but consented to a reduction of the rent, the plaintiffs should be charged with such reduction. It is also claimed that $280 paid on insurance and $479.16 on repairs should be charged to the plaintiffs because unauthorized by defendant *Johnson.*

The only question, therefore, to be considered is whether the $2,625, uncollected amount of rent on Brown lease, $280 paid on insurance, and $479.16 on repairs should be charged to plaintiffs. It appears from the evidence that the lease of the mortgaged property was made to M. W. Brown on the 22d day of May, 1895, for a period of five years, at the annual rental of $1,500; that according to the terms thereof payments were to be made to *Wilmarth* and applied on taxes, insurance, and mortgage indebtedness of plaintiffs. About one year after the execution of the lease Brown failed to comply with its terms, and the rent was reduced from $125 per month to $100, and afterwards to $75, and later to $60. The plaintiff *Wilmarth* testified that this reduction of rent was made with the consent of *Johnson,* and the facts and circumstances in the case seem to corroborate this theory. The evidence shows that the times were hard. Brown failed to make his payments promptly, and was probably insolvent. It was considered for the interest of all parties that the rent should be reduced, and there is ample evidence that it was done with the consent of *Johnson.* There is some evidence to the effect that *Johnson* proposed taking the premises himself, when the question of reduction of rent came up, but this proposition was never carried out, and Brown was suffered to remain in possession until the property was afterwards

leased to Keneally. It is undisputed that this $2,625, amount of uncollected rent, which *Johnson* claims should be charged to the plaintiffs, was never collected or applied on the indebtedness. The answer of defendant *Johnson* alleges that plaintiff *Wilmarth* agreed to collect all of this rent, but this allegation is unsupported by the evidence. It is very clear that the $2,625, uncollected rent, upon any theory of the testimony, is not chargeable to the plaintiffs.

Concerning the other items—$280 on insurance and $479.16 on repairs—we think the evidence is ample that this insurance and the bills for repairs were paid, by authority and with the consent of defendant *Johnson*, out of the rent moneys collected. The lease provided that insurance and taxes should be paid out of the rents, and the mortgage also provided that the property should be kept insured at the expense of the mortgagors. It appears that in the fall of 1895, when the plaintiff *Wilmarth* took charge of the mortgaged property, there was one year's back insurance, amounting to about $280, and several years' back taxes. It seems that the first rent was used by *Wilmarth* to pay the back insurance, about $280, and the back taxes. This $280 insurance, as we understand it, is the insurance which the defendant *Johnson* claims plaintiffs had no authority to pay; but it was *Johnson's* debt and was paid for his benefit. Plaintiff *Wilmarth* testifies that all disbursements were made at the request of defendant *Johnson* and were consented to by him, and that statements were furnished showing the items of insurance, taxes, and repairs. It is clear from the evidence that all insurance and taxes, as well as money expended for repairs, were for the benefit of the property in which defendant *Johnson* had an equity of redemption. These expenses were incurred and paid for the purpose of preserving and keeping up the property and securing an income therefrom, and the claim of counsel that they should be charged to plaintiffs is not supported by the evidence.

The findings of the court below established the amount of rents collected, the amount of moneys paid out for insurance, taxes, and repairs, and the amount which by agreement of plaintiffs and defendant *Johnson* was applied on the mortgage indebtedness. If these findings stand, the judgment of the court below must be affirmed. We have carefully examined the evidence and are satisfied that the findings are sustained by the evidence, or at least that there is no such preponderance of the evidence against such findings as would justify this court in disturbing them.

By the Court.—The judgment of the court below is affirmed.

ALEXANDER & EDGAR LUMBER COMPANY, Respondent, vs. MCGEEHAN, Appellant.

February 2—February 21, 1905.

Agency: Failure to disclose: Personal liability of agent.

Where in making a contract an agent apparently acts for himself, and those dealing with him do not know and are not chargeable with knowledge of the facts as to the agency, he renders himself personally liable.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

Action to recover on contract. The answer was a general denial. The only issue litigated upon the trial was whether the contract was made by the defendant as agent for the Iron River Boom & Improvement Company under such circumstances as to preclude plaintiff from successfully charging him as the principal. It was shown that he did in fact act as agent, though he used language appropriate to a personal contract and did not at any time expressly disclose his agency. There was evidence establishing, or tending to establish, cir-

cumstances which it was claimed, on the part of the defendant, so strongly suggested to the plaintiff at the inception of the contract the facts of the matter as to charge him with knowledge thereof. The court directed the jury to return a verdict for the plaintiff, which was done and judgment rendered accordingly, from which defendant appealed.

For the appellant there was a brief by *Lamoreux & Shea,* attorneys, and *John M. Flynn,* of counsel, and oral argument by *W. F. Shea.*

For the respondent there was a brief by *Tomkins, Tomkins & Garvin,* and oral argument by *W. M. Tomkins.*

MARSHALL, J. It may be, as counsel for appellant contends, that the learned circuit court directed the verdict upon the theory that if one person acting as agent contracts with another, without expressly declaring his agency and the name of his principal, he will bind himself regardless of whether that other has such knowledge of the facts respecting the matter that a man of ordinary intelligence, acting with reasonable prudence under the circumstances, might know the real status of such person in the transaction and his intention. The way the rule is commonly stated in the books one might, looking thereto only, get that idea. In *West v. Wells,* 54 Wis. 525, 11 N. W. 677, speaking of the facts of that case, where there was no claim that the necessary disclosures were made expressly or circumstantially, or that the facts were otherwise known to the person contracting with the agent, and there were no circumstances otherwise varying the rule, it was said that the sole question, as to whether the agent was personally liable or not, was, Did he disclose his principal? The rule is often stated unqualifiedly thus: If in a simple contract made by an agent the agent does not disclose his agency and name his principal, he will render himself liable. *Royce v. Allen,* 28 Vt. 234. That is a correct statement, but like most general rules it is not entirely without exceptions. The general

statement should not be construed as requiring the agent under all circumstances to expressly declare his agency and the name of his principal,—to do so regardless of whether the person dealing with him knows the facts, or is chargeable with knowledge thereof from circumstances brought to his attention. Where one deals with the agent of a known principal in the regular course of conducting the principal's business by such agent, the presumption, in the absence of any evidence to the contrary, is that the credit is extended to the former. Mechem, Agency, § 558; *Ferris v. Kilmer,* 48 N. Y. 300; *Meeker v. Claghorn,* 44 N. Y. 349; *Wright v. Cabot,* 89 N. Y. 570; *Nichols v. Martin,* 35 Hun, 168; *Argersinger v. Macnaughton,* 114 N. Y. 535, 540, 21 N. E. 1022.

However, it is considered that in this case there is no definite evidence that respondent knew the facts as regards appellant's status in the transaction, or of circumstances charging him with such knowledge when the contract was made. Appellant seems to have, on the face of things, contracted in his own name and on his own responsibility. It is not deemed advisable to recite and discuss the evidence. The case is a very simple one as it seems here. The trial court would have been justified in directing the verdict upon the ground that neither the agency of the appellant nor the name of the party he represented was, expressly or circumstantially, disclosed at the time the contract was made, so as to rebut reasonably the indications from his language and conduct that he was acting for himself. Such being the case, the judgment must be affirmed.

By the Court.—Judgment affirmed.

WILLIAMS, Respondent, vs. NORTH WISCONSIN LUMBER COMPANY and another, Appellants.

February 2—February 21, 1905.

Negligence: Amendment of pleading: Instructions to jury: Defining "ordinary care:" Master and servant: Who are fellow-servants: Negligence in making repairs: Court and jury.

1. Where the cause of action stated was plainly one for simple negligence, it was not error to permit plaintiff, at the opening of the trial, to strike from the complaint words characterizing defendants' act as "wilful, wanton, and reckless."
2. Ordinary care is that degree of care usually or ordinarily exercised by persons of ordinary care and prudence (or the great majority of people) engaged in the same or similar business under the same or similar circumstances; and a charge defining it as such care as persons of ordinary care and prudence ordinarily use "under all the facts and circumstances surrounding them at the time," was erroneous.
3. The instructions and general charge in this case are criticised as stating, in substance, that notwithstanding none of the facts necessary to charge the defendant company with negligence had been proven, still if the jury found the company guilty of negligence which was the proximate cause of the injury they might find a verdict against the company—thus apparently giving the jury liberty to pronounce anything negligence which they might choose.
4. When the master has provided for the servant a safe place to work, safe tools and appliances, and competent and careful co-employees, and has given sufficient warning of hidden or latent dangers, he may commit to the employees the details of the work, including incidental repairs or readjustment of machinery which can easily be made by the employees themselves from proper materials furnished by the master; and such servants, thus prosecuting the work or making such readjustment or incidental repairs, become fellow-servants, whatever their rank, so that the negligence of one by which others are injured is the negligence of a fellow-servant.
5. So *held* as to the negligence, if any, of the superintendent of a lumber company operating an electric light plant, in directing the current to be turned on, to test the operation of a dynamo after making a change in the armature, without notifying an employee who was engaged in splicing a wire in the street, and who was killed by the test current.

6. Whether such act of the superintendent was negligence rendering him liable, and whether the deceased was guilty of contributory negligence, are *held*, on the evidence, to have been questions for the jury.

APPEALS from a judgment of the circuit court for Sawyer county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This is an action by the plaintiff, as administratrix of the estate of Ben Williams, deceased, for damages sustained by her as widow of said Ben Williams on account of his death, which is claimed to have been caused by the negligence of the defendants on September 1, 1902. The evidence showed, without substantial dispute, the following facts:

At the time of the accident, and for some time prior thereto, the defendant lumber company owned and operated a sawmill at the village of Hayward, and also an electric light plant, with which it lighted its factory and the streets and residences of said village; and the defendant *Rogers* was the superintendent of its lumber business as well as the electric light business. For a number of years the deceased, Ben Williams, operated a dynamo at the electric light plant at night, and made repairs upon the plant and wires during the forenoon, and took a rest in the afternoon. One Fox was engineer of the engine at the planing mill, and assisted in making repairs on the dynamo from time to time. Three days before the death of Williams the armature of the dynamo was burned out, and taken to Minneapolis by *Rogers* to be repaired, and during his absence the street lights were not in operation. *Rogers* returned with the armature on Saturday night, but it was not put in position until Monday, which was the day of the injury. On that day defendant *Rogers* sent a boy to the residence of Williams to ask him to come to the dynamo room and assist in repairs. The boy, however, returned with the information that Williams was not at home, having taken his daughter out into the country to a school which she was teaching, and that he would not return till

after dinner. Thereupon *Rogers* set Fox to work putting in the armature, and at about 1 o'clock Fox had completed the adjustment of the armature, and *Rogers* came to the dynamo room at this time and gave Fox assistance in completing the work, and then instructed him to turn on the steam and start the engine, to see if it worked satisfactorily. Fox turned on the power, but for some reason it did not operate satisfactorily, and *Rogers* thereupon pressed the brushes (which are a part of the dynamo) with his hands, and again ordered the power turned on, which was done by Fox, and a good current was produced, and after running a few moments the power was shut off.

It further appears that Williams had driven into the country about half past 7 o'clock that morning with his daughter, and that he arrived home shortly before noon; that during his absence some men who were moving a building through the street sent word to Williams's residence requesting him to cut one of the electric light wires which was in the way of the moving building; that Adolph Williams, son of the deceased, who had worked for some months as assistant to his father, volunteered to cut the wire and did so; that when deceased arrived home his son informed him of the cutting of the wire, and deceased then proceeded to the place for the purpose of splicing the same, and without informing *Rogers* of his intention he climbed the pole, and was attempting to splice the ends of the wire at the very time when the test current was turned on by *Rogers,* and in some manner the deceased came in contact with both the negative and positive wires, thereby producing a short circuit and causing his death; that it was the practice of *Rogers* during all the time while deceased acted as electrician that the current should not be turned into the wires by any person other than the deceased, or, if done by any one else, that the deceased should first be notified; that deceased did not know that the armature had returned when he was attempting to splice the wires, and that neither

Rogers nor Fox knew that the wire had been cut or that the deceased had returned from his errand in the country.

Both defendants moved for direction of a verdict, which motions were overruled. The court charged the jury, at the request of the defendants, as follows:

"(1) You are instructed that in repairing the dynamo and testing it both *Rogers* and Fox were fellow-servants of Ben Williams, and that he, the said Williams, assumed the risk of any injury which might be caused by their negligence in making such repairs and test.

"(2) You are instructed that you cannot find the defendant *North Wisconsin Lumber Company* negligent in this action on account of any failure on its part to furnish reasonably safe tools, implements, and appliances with which Ben Williams was required to work.

"(3) You are instructed that you cannot find defendant lumber company negligent because of any incompetency of either Fox or *Rogers*.

"(4) You are instructed that to make the defendant lumber company liable in this action the plaintiff must satisfy you by a fair preponderance of the evidence that the lumber company failed in one or more of the following duties: (1) That it failed to furnish him a reasonably safe place in which to do his work; (2) that it failed to provide him with reasonably safe and proper tools, implements, and apparatus; (3) that it failed to provide reasonably competent and careful co-employees to work with him. These are the three duties the master owes to his servant, and before the plaintiff can recover she must satisfy you that the defendant lumber company failed in some one or more of these three respects.

"(5) You are instructed that there is no evidence in this case tending to show that the defendant lumber company did not provide reasonably safe and suitable tools and apparatus and reasonably careful and competent employees.

"(6) You are instructed that in performing the act of directing Fox to turn on the current to test the armature *Rogers* was acting as a fellow-servant of deceased, and the defendant lumber company is not liable for such direction, even though you believe it was negligently given.

"(7) If you find deceased was guilty of any want of ordi-

nary care, however slight, which contributed directly to his death, the plaintiff cannot recover.

"(8) You are instructed that the duty to warn deceased that the current was about to be turned on did not exist unless you are satisfied from the evidence that the defendant lumber company or *Rogers* knew, or ought to have known, that the deceased was or might probably be engaged in repairing the wires.

"(9) You are instructed that you cannot find for the plaintiff and against either defendant unless you are satisfied to a reasonable certainty by a fair preponderance of the evidence that one or both of the defendants was guilty of some negligent act or omission which was the proximate cause of Ben Williams's death.

"(10) You are instructed that you cannot find that the negligent acts or omissions of the defendants, or either of them, were the proximate cause of deceased's death, unless you are satisfied that the injury to deceased was the natural and probable result of such act or omission, and unless you further find that an ordinarily prudent person in the light of the attending circumstances would have anticipated that injury might probably occur by reason of such act or omission.

"(11) You are instructed that you cannot find defendant lumber company liable to plaintiff simply because *Rogers* neglected to inform deceased that he (*Rogers*) was about to have the current turned on.

"(12) You are instructed that you cannot find defendant lumber company liable simply because *Rogers* directed the current to be turned on at the time he did.

"(13) You are instructed that deceased, by his contract of employment, assumed all risk of injury by reason of the negligent manner in which his co-employees might carry on the work of their common master.

"(14) You are instructed that the fact that the insulation of the wires was defective was not the proximate cause of deceased's death."

The court further charged, of its own motion, as follows:

"Now, gentlemen, it is for you to say, under the whole evidence in this case, whether these defendants, or either of them, were guilty of such an act of negligence as they should be compelled to respond in damages for this accident. I have

given you certain propositions of law which it is your duty to adhere to and follow in arriving at a verdict. The claim of the plaintiff is that, owing to a lack on the part of defendants, and especially owing to a lack on the part of defendant's general manager, *Rogers,* in failing to give the deceased, Williams, notice before the current of electricity was turned on, that the defendants were guilty of such an act of negligence as to make it actionable under the law, while the claims of defendants were that they used every ordinary caution and used all the foresight that could be expected of them under the particular facts and circumstances surrounding this case. It is for you, gentlemen, and you alone, to say what the truth is in that respect. I might say here that you cannot find a verdict in favor of the plaintiff unless you find that the defendants, or at least such one of them against which you may find a verdict, was guilty of negligence. Negligence is defined to be a lack of ordinary care, or such care as persons (or, in this case, corporations) of ordinary care or prudence ordinarily use under all the facts and circumstances surrounding them at the time."

The jury rendered a verdict for the plaintiff against both defendants, and assessed the damages at $5,125. Motions were made by both defendants for judgment *non obstante,* and also that the verdict be set aside and for a new trial; all of which motions were overruled and judgment entered for the plaintiff on the verdict, and the defendants separately appeal.

For the appellants there was a brief by *Bundy & Wilcox,* and oral argument by *C. T. Bundy.*

For the respondent there was a brief by *W. F. Bailey, H. B. Walmsley,* and *Sam. J. Williams,* and oral argument by *Mr. Walmsley.*

WINSLOW, J. The complaint in this action, as originally drawn, charged as one ground of actionable negligence that the defendants carelessly and negligently turned on the electric current without notice to the deceased, and knowing that the deceased was either working upon or likely to be working

upon the wires, whereby the deceased was killed. The complaint then went on to negative any negligence on the part of the deceased, and stated that the death was wholly caused by the "wilful, wanton, reckless, negligent act of the defendants," and by their turning on the electric current knowing that said deceased was working upon the wire. At the opening of the trial the plaintiff moved to amend the complaint by striking out the words *"wilful, wanton,* and *reckless,"* and the court permitted the amendment, stating that, if a sufficient affidavit of surprise were filed by defendants, the case would be continued at plaintiff's costs. The defendants excepted to the ruling, but made no claim of surprise. There was no error in the ruling. The clauses of the complaint which were intended to state the gist of the cause of action plainly charged simple negligence, not gross negligence or wilful wrong. The subsequent characterization of the act as "wilful, wanton, and reckless" as well as negligent was plainly contradictory and confusing as tending to introduce an inconsistent cause of action, namely, one based on gross negligence, and it was entirely proper to strike out those words.

The main questions in the case, however, are the question whether the evidence showed any liability on the part of the defendants and the question whether the charge of the court was erroneous. The test of ordinary care given in the charge is certainly inaccurate, and we can but regard the inaccuracy as prejudicial. Ordinary care has been frequently defined by this court as that degree of care usually or ordinarily exercised by persons of ordinary care and prudence (or the great majority of people) engaged in the same or similar business under the same or similar circumstances. *Rylander v. Laursen, ante,* p. 2, 102 N. W. 341, and cases cited. Comparing this long-established rule with the rule given in the charge, it is apparent that an important element has been omitted. The people whose ordinary conduct is to be the

test must be surrounded by the same or similar circumstances as surrounded the persons whose act is in question. This necessary element is wholly left out, and, instead thereof, it is said that ordinary care is such as is ordinarily used by persons whose conduct is the test "under the facts and circumstances surrounding *them* (i. e., the persons whose conduct is the test) at the time." Plainly, these last-named "facts and circumstances" might well be entirely different from the facts and circumstances surrounding the defendants in the instant case. This instruction, therefore, was erroneous, and necessitates a reversal of the judgment as to both defendants.

Proceeding to a critical examination of the general character of the charge, we confess that we have experienced great difficulty in ascertaining upon what theory this case was submitted to the jury. The alleged defective insulation of the wires was eliminated from the case, as will be seen by instruction No. 14. The court charged positively that the defendant lumber company could only be held liable if it failed either (1) to furnish a reasonably safe place to work, (2) to provide reasonably safe and proper tools, or (3) to provide reasonably competent and careful co-employees. In immediate connection with this proposition the court charged, in effect, that there was no evidence that the defendant company had failed to provide either safe and suitable tools or careful and competent co-employees, and that the company could not be found negligent on either account. Thus both the second and third grounds of possible liability on the part of the defendant company were excluded from consideration, leaving only the question of the failure to furnish a safe place to work. But, after the claim of defective insulation is negatived, the electric light pole, where the plaintiff's intestate was engaged at work, appears to have been as safe as such places are ordinarily made. There was no danger save the necessary danger arising from the fact that it carried two electric wires which might at any time be charged with a deadly current of

electricity. The failure to warn Williams of the turning on of the current was the act of negligence which was claimed to be the proximate cause of the injury, both in the trial court and by the respondent's brief in this court. Hence, if the court was correct in the enumeration of the sole grounds of liability against the company, it seems certain that upon his own theory he should have instructed the jury to return a verdict for the company. But passing from this apparent inconsistency, we find that upon the subject of the failure to give notice the court charged that both in repairing and testing the dynamo *Rogers* and Fox were fellow-servants of Williams, and that Williams assumed the risk of any injury arising from their negligence in making such repairs *and tests;* and, further, that the lumber company could not be found liable simply because *Rogers* directed the current to be turned on, or because he neglected to inform deceased that the current was about to be turned on. We have been unable to see what question remained as to the alleged liability of the lumber company after the instructions above cited had been given. Not only had the three specific grounds which alone (upon the court's own theory) would justify a recovery by the plaintiff been negatived by the court, but the possible additional ground of failure to notify had also been denied by the court.

At this point the plaintiff seems to have been charged out of court, so far as any claim against the lumber company is concerned; but the court then proceeds to say, in substance, that it is for the jury to say whether defendants, or either of them, were guilty of such an act of negligence as should compel them to respond in damages; that the plaintiff's claim is that *Rogers's* failure to notify Williams was actionable negligence, while defendants' claim is that they used ordinary caution and foresight under the circumstances; that it is for the jury alone to say what the truth is in that respect; that a verdict cannot be found against either defendant unless such de-

fendant was guilty of negligence, and that negligence is lack of ordinary care. The sum and substance of the charge is that, notwithstanding none of the facts necessary to charge the defendant company with negligence has been proven, and notwithstanding that the failure of *Rogers* to notify Williams does not render it liable, still, if the jury find the company guilty of negligence which was the proximate cause of the injury the jury may find a verdict against the company. What guide the jury had to determine what act or omission could be called negligence under this charge it is difficult to see. Apparently they were given liberty to pronounce anything negligence which they might choose.

However this may be, the consideration of the motions to direct a verdict for the defendants and for judgment *non obstante* calls for general discussion of the law applicable to the case and renders it unnecessary to pass upon the correctness of the various propositions of the charge in detail. When the evidence in the case closed, the only ground upon which liability could be reasonably claimed against either defendant was the ground that the turning on of the electric current without warning constituted actionable negligence. So far as the defendant lumber company was concerned, the solution of this question depended primarily upon the question whether *Rogers* was a vice-principal or a co-employee in the performance of that act.

There are certain duties which the master owes to his employees which he cannot delegate. These are the duty to furnish a reasonably safe place to work, considering the nature of the work in hand; the duty to furnish reasonably safe tools and appliances; the duty to provide reasonably competent and careful fellow-servants; and the duty to warn an employee of latent dangers in the work which the employee cannot, in the exercise of ordinary care, be expected to ascertain. *Portance v. Lehigh Valley Coal Co.* 101 Wis. 574, 77 N. W. 875; *Baumann v. C. Reiss Coal Co.* 118 Wis. 330, 95

N. W. 139; *Klochinski v. Shores L. Co.* 93 Wis. 417, 67 N. W. 934. When the master has provided a safe place, safe tools, competent and careful co-employees, and has given sufficient warning of hidden or latent dangers, he may doubtless commit to the employees the details of the work, including incidental repairs or readjustment of machinery made necessary by ordinary prosecution of the business, and which can easily be made by the employees themselves from proper materials furnished by the master; and such servants, thus prosecuting the work or making such readjustment or incidental repairs, become fellow-servants, whatever their rank, so that the negligence of one by which others are injured is the negligence of a fellow-servant. Cases illustrative of this principle are numerous. *Van den Heuvel v. National F. Co.* 84 Wis. 636, 54 N. W. 1016; *Dahlke v. Illinois S. Co.* 100 Wis. 431, 76 N. W. 362; *Okonski v. Pennsylvania & O. F. Co.* 114 Wis. 448, 90 N. W. 429; *Grams v. C. Reiss Coal Co.* 125 Wis. 1, 102 N. W. 586; *Wosbigian v. Washburn & M. Mfg. Co.* 167 Mass. 20, 44 N. E. 1058; *Cregan v. Marston,* 126 N. Y. 568.

The present case falls within this principle so far as the defendant company is concerned. The changing of the armature was a detail of the business which might properly be left to the employees themselves. In making this change and testing the operation of the dynamo after the change was made, *Rogers* was acting as a fellow-servant, and for any negligence committed by him therein the master was not liable; and a verdict should have been directed.

Whether *Rogers's* act was negligent so as to impose liability upon himself, and whether the deceased was guilty of contributory negligence, were questions for the jury under proper instructions.

By the Court.—Judgment reversed upon both appeals, and action remanded with directions to enter judgment for the defendant lumber company, and to award a new trial as to the defendant *Rogers.*

BREHM, Respondent, vs. UNITED STATES FIDELITY & GUARANTY COMPANY, imp., Appellant.

November 18, 1904—March 14, 1905.

Guardian and ward: Cumulative bond: Discharge of sureties, when valid: Liability: Prior conversion of moneys: Failure to account.

1. Pursuant to an order of the county court the guardian of an incompetent person gave a new bond, and on the same day filed an account. Thereupon the court made an order reciting that the new bond was to take the place of the one theretofore given, allowing the account, and directing that the old bond be satisfied and the sureties and principal be released from further liability thereon. Notice was not given as provided for in sec. 3967, Stats. 1898, nor was there any examination of the account as prescribed in sec. 3972, nor any compliance with sec. 4281*b*. *Held*, that the release was ineffective and that the new bond was merely cumulative.
2. The sureties on such new bond were liable, in accordance with its terms, for a breach thereof by failure of the guardian to settle his account at the expiration of his trust and to "pay and deliver all the property, real and personal, remaining in his hands, or due from him on such settlement,"—even though, before such bond was given, the guardian had converted moneys of the estate to his own use and had given himself false credits of equal amount in the account filed and approved when the new bond was given.
3. The attempt of a guardian to loan funds of his ward to himself, and the giving of his note therefor, cannot be considered an investment of the trust funds or lessen his liability to account therefor as guardian.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

This action was commenced February 13, 1902, to recover $10,469.56 upon a guardian's bond given by the defendant Otto Brehm as principal, and the defendant guaranty company as surety, January 5, 1899. The execution of the bond and liability to a certain amount are admitted, but it is claimed that the amount of the recovery is excessive. Issue

being joined and trial had, at the close of the trial the court found as matters of fact, in effect:

(1) That September 29, 1896, the defendant Otto Brehm was appointed guardian of Jacob Brehm, an incompetent person, and was required to give bond in the sum of $30,000, which bond was given by Otto with sureties, and approved by the county court, and October 15, 1896, letters of guardianship were issued thereon to Otto.

(2) That December 14, 1896, Otto, as such guardian, filed his inventory therein, from which it appeared that there were notes and mortgages belonging to Jacob which amounted to the appraised value of $24,440.47, cash $237, and real estate $1,000; making a total of $25,677.47.

(3) That December 10, 1897, Otto, as such guardian, filed a verified account in the county court, by which it appeared that, after deducting expenditures, there remained in his hands notes and mortgages amounting to $22,943, balance on hand $1,551.07, real estate, $1,000; making a total of $25,497.07.

(5) That January 5, 1899, pursuant to an order of the county court, Otto gave to the said Jacob a new bond in the sum of $30,000, signed by Otto as principal and the defendant guaranty company as surety, containing the following:

"The condition of the above obligation is such, that whereas the above-named principal obligor has been appointed guardian of the above-named obligee, incompetent: Now, therefore, if the said Otto Brehm shall make a true inventory of all the estate, real and personal, of his said ward, that shall come to his possession or knowledge, and turn the same into the county court of the proper county within such time as the judge shall order, and shall dispose of and manage all such estate according to law and for the best interest of the ward, and faithfully discharge his trust in relation thereto and also in relation to the care and custody of the ward, and shall render an account, on oath, of the property, real and personal, of the ward in his hands, and all proceeds or interest derived therefrom, and of the management and dis-

position of the same, within one year after the filing of his last annual report, and annually thereafter, and at such other times as the proper court shall direct, and shall, at the expiration of such trust, settle his account with the county court, or with the ward if he shall be adjudged competent, or with his legal representatives, and pay and deliver all the property, real and personal, remaining in his hands, or due from him on such settlement, to the person or persons entitled thereto, then this obligation to be void; otherwise of full force, virtue, and effect."

(4) That January 5, 1899, and after such execution of the new bond, Otto filed his verified account in the county court, in which he was charged with the following amounts: Personal property as per last account, $24,433.82; interest received since the last account, $1,036; real estate $1,000—making the total of $26,469.82; and he was therein credited with numerous items in the aggregate amount of $26,469.82.

(6) That January 5, 1899, the county court made an order approving of such new bond of Otto, and filed the same January 6, 1899, which order, among other things, recited that such bond was "to take the place of a bond heretofore given by the said Otto Brehm as general guardian, and upon filing the account of said guardian up to date, which account is hereby allowed and confirmed, it is ordered that the said bond heretofore given by the said Otto Brehm as general guardian, and his sureties, be satisfied, and that the sureties on said bond and the principal be released from any further liability on the same." Such guardian's account was not examined by the county court at its next regular term after the date of order or of the filing of said account, nor was it examined by that court on notice to the ward or to any other person, nor was a guardian *ad litem* appointed for the ward to receive such notice, or to represent the ward at such examination, before the making or entry of such order of January 5, 1899, notwithstanding the fact that said account on its face showed a loan of $5,500, made by the guardian from the estate to

himself individually, which was *prima facie* evidence of the conversion of that sum by the guardian.

(7) In July, 1899, Otto absconded without any new accounting, and his whereabouts since has been unknown. December 12, 1899, the county court, pursuant to due notice of hearing, revoked the guardianship of Otto and removed him, and by the same order the plaintiff, *William Brehm,* was appointed such guardian in his place, and letters of guardianship were granted to him January 11, 1900.

(8) After hearing and on November 24, 1900, the county court adjudged that there was due to the estate of Jacob from Otto $10,469.56, with interest from January 5, 1899, and that Otto and the guaranty company were liable therefor, and by order made at that time the plaintiff was directed to bring an action to recover such amount.

(9) On May 1, 1901, Jacob died testate, and his will was admitted to probate June 25, 1901, and on July 16, 1901, the plaintiff was appointed administrator of his estate with the will annexed, and his bond as such was approved August 23, 1901, and letters of administration thereupon issued to him.

(11) Pending an appeal therefrom to the circuit court, and pursuant to a stipulation filed on January 20, 1902, the county court ordered this action to be brought upon the bond of January 5, 1899.

(12) In the account of January 5, 1899, there was an error in favor of Jacob of $9.75, which, when taken out, left a balance of $26,002.46. Plaintiff received as such administrator of the estate notes and mortgages amounting to $13,898, which were scheduled in Otto's account of January 5, 1899; also Meyer note and mortgage, upon which there was a balance due of $100 after deducting the payment to Otto of $300, and not accounted for. The plaintiff also received and credited to Otto's account notes and mortgages running to Jacob or to Otto $1,280, not scheduled in his account of January 5, 1899; also real estate $1,000—making a total of

$16,278, which, when deducted from the $26,002.46, leaves a balance of $9,724.46, with interest from January 5, 1899, all of which remains unpaid.

(13) The following securities, inclosed in a package of papers, were handed to the attorney for the plaintiff, but were never accepted by the plaintiff as part of the estate of Jacob; that is to say: (a) Note of Herman Brehm for $229, dated October 26, 1897, payable to Hugo Brehm, which never belonged to Jacob Brehm, deceased, or to his estate. (b) Note of Grashorn for $500, dated December 5, 1898, payable to Otto, which never belonged to Jacob or to his estate. (c) Note of Muller for $50, dated October 22, 1887, due one year after date, payable to Jacob, interest paid to October 22, 1892, scheduled in the inventory of Otto as guardian, but is therein stated to be uncollectible and is appraised as worthless, and was not charged to Otto in said inventory, but was fraudulently credited to him as an asset on hand. (d) Note of Giblin, dated June 5, 1897, for $25, not included in either of the accounts of Otto, and is not collectible. (e) Note of Otto for $1,000 to Jacob, dated April 27, 1897, payable two years after date, with interest, scheduled in Otto's first account but not in his last account, and which is of no value. (f) Note of Otto to Jacob for $1,200, dated May 6, 1899, which is not collectible and is of no value. (g) Note of Hugo Brehm to Otto Brehm for $50, dated November 27, 1893, payable six months after date to Otto, not inventoried, and is not included in either account, and never belonged to Jacob or to his estate, and was outlawed when the plaintiff was appointed as Otto's successor, and is not collectible.

(14) The following items in Otto's account of January 5, 1899, never came to the possession of the plaintiff in any capacity: (a) Otto's note and mortgage to Jacob for $5,500, dated January 5, 1899, assigned to the bank June 5, 1899, as collateral security for the payment of $3,000, besides interest; and such assignment was an appropriation thereof

by Otto to his own use and benefit for the payment of his personal debts. (b) Note of De Wilde and Gagodnigg for $2,000, dated June 6, 1898, payable to Otto, with an indorsement of $500 and interest to June 6, 1899. The note was afterwards transferred by Otto to the Citizens' Bank of Sheboygan, and was afterwards paid to the bank by one of the signers, and none of the money received thereon has ever come to the hands of the plaintiff in any capacity. Such transfer of the note by Otto was an appropriation thereof to his own individual use. (c) Note and mortgage given by Eimermann for $2,500, dated May 29, 1896, payable to Jacob, paid to defendant Otto March 16, 1899, and the mortgage was satisfied of record by him, and he has not accounted for any of the proceeds. (d) Cash to the amount of $435.21, on hand January 5, 1899—making the total amount $9,935.25.

(15) At the time of executing the bond of January 5, 1899, there was no petition by any surety on the first bond asking for release from future liability thereon, and there was no order by the court to show cause why Otto, as such guardian, should not be required to account and the sureties on the first bond be released, or that Otto, as such guardian, be required to give a new bond; and no petition or order to show cause of any kind was made or served at any time or prior to the giving of the new bond, as required by sec. 4281*b*, Stats. 1898.

(16) The summons in this action was not served upon the defendant Otto.

(17) That Otto, as such guardian, has committed the following breaches of the bond of January 5, 1899, upon which this action is brought: (a) He did not dispose of and manage all of the estate coming to his hands according to law and for the best interest of the said Jacob, and faithfully discharge his trust in relation thereto; but, on the contrary, by making investments on insufficient security and by converting money

and property of the estate to his own use, wasted the said estate to the damage of the plaintiff. (b) He failed and neglected to file any account of the property, real and personal, in his hands, and the proceeds and interest derived therefrom, and the management and disposition of the same, within one year from the time of his last report, January 5, 1899, or at any time thereafter. (c) He failed, upon the expiration of the trust, December 12, 1899, when he was removed from his trust as guardian, to settle his account with the county court, or with the plaintiff as guardian of Jacob or as such administrator, and has failed and neglected to pay over and deliver all of the property, real and personal, then remaining in his hands or due from him to the plaintiff as such guardian or as such administrator, and he has ever since that time failed and neglected to settle his account with the county court or the legal representative of Jacob, deceased.

And as conclusions of law thereupon the court found that by reason of the said breaches of the bond and the waste of said property and the failure to pay over and deliver all of the same to the plaintiff, the plaintiff, as such administrator, has suffered damage to the amount of $9,724.46, for which amount Otto, and the guaranty company as surety, are now indebted to the plaintiff, with interest thereon from January 5, 1899; that the plaintiff, as such administrator, is entitled to judgment for said sum, with interest thereon from January 5, 1899, against the defendants Otto and the guaranty company, jointly and severally, with costs and disbursements of this action to be taxed; and judgment was ordered to be entered accordingly. From the judgment so entered the guaranty company appeals.

For the appellant there were briefs by *Simon Gillen* and *Winkler, Flanders, Smith, Bottum & Fawsett,* and oral argument by *J. G. Flanders.*

Francis Williams, for the respondent.

The following opinion was filed January 10, 1905:

CASSODAY, C. J. 1. This case must turn upon the construction and effect of the bond of January 5, 1899, upon which this action is based. The conditions of the bond are given in full in the foregoing statement. At the time of giving the bond the statute required the guardian of an incompetent person to give bond in like manner and with like condition as prescribed with respect to the guardian of a minor, with one exception not relevant here. Sec. 3981, Stats. 1898. The reference therein is to the section which declares that, "before appointing any person guardian of a minor, the court shall require such person to give a bond to the minor" as therein directed and conditioned as therein prescribed. Sec. 3966, Stats. 1898. As stated by counsel for the defendant, the conditions of the bond here in question are in the terms required by that section. Counsel contends that the conditions of the bond are all prospective, and in support of such contention cites *Holden v. Curry,* 85 Wis. 504, 511, 55 N. W. 965, 967, where Mr. Justice PINNEY, speaking for the court, said that:

"All the prescribed conditions of the bond are prospective, and none of them have any relation to what has occurred in the past. The bond is therefore no protection or security to the ward for any interference or intermeddling with his property by his guardian before he was appointed such."

As stated by the learned trial judge in a carefully prepared opinion—so much of which should have been printed in the case as is required by the rule:

"The real point there decided in this regard is that a surety on the bond of a guardian is not liable for his acts of intermeddling with the ward's estate before any guardian had been appointed."

The question of "the liability of a surety on an additional or cumulative bond of the guardian" was not there involved, and of course was not adjudicated. In the case at bar Otto

had been such guardian of Jacob for more than two years prior to the giving of the additional bond in question. In regard to the giving of such bonds and the discharge of sureties on bonds previously given, the statute declares that:

"The county court may, at any time, require additional bonds to be given by any guardian whenever it shall deem it necessary, and may discharge the existing sureties from future responsibility, *after notice* given as such court may direct, when it shall *satisfactorily* appear that no injury can result therefrom to those interested in the estate." Sec. 3967, Stats. 1898.

Here it affirmatively appears that no notice, as thus prescribed, was ever given, and that no examination of the guardian's account was ever had, as prescribed by statute; much less that it was made to appear to the county court, satisfactorily, that no injury could result from the discharge of sureties on the prior bond to those interested in the estate. Secs. 3967, 3972, Stats. 1898. Under a similar statute it was held in Michigan that

"the discharge of a surety on a guardian's bond is void where it is made without notice to the ward or his next of kin, and without examination of the guardian's account, but merely on the verbal application of the surety and the consent of the guardian." *Rice v. Wilson,* 129 Mich. 520, 89 N. W. 336.

In *Clark v. Wilkinson,* 59 Wis. 543, 545, 18 N. W. 481, cited by counsel for the defendant, the question of the liability of a surety upon such additional bond was involved, but it appeared "affirmatively that there had been no waste of the trust funds by the guardian at the time the defendant became surety in the bond." 59 Wis. 551 (18 N. W. 484). So the question of defalcation prior to the execution of the bond in that suit was not involved; but Mr. Justice TAYLOR, speaking for the court, there said that:

"It is evident to us that the surety on this bond is not only liable for the failure of the guardian to account for the moneys received by him as guardian after the bond was exe-

cuted, but he is equally liable for all money in the hands of the guardian belonging to the wards at the time the bond was executed." 59 Wis. 549 (18 N. W. 483).

It is claimed by counsel for the defendant that sec. 3967 was supplemented by sec. 4, ch. 335, Laws of 1897, now contained in sec. 4281*b*, Stats. 1898. That section expressly authorized a surety on a guardian's bond or his representative to apply to the proper court by petition "to be relieved from further liability as such surety" for such acts of the guardian as might occur "after the date of the order relieving" him, to be granted, as therein provided, upon an order to show cause why the guardian should not account and give a new bond and the surety be relieved from further liability. As stated in the opinion of the learned trial judge:

"The bond in suit was not given pursuant to sec. 4281*b*. No surety on the first bond petitioned the court to be released from future liability thereon; nor that the guardian be required by order of the court to show cause why he should not account and the surety be relieved; nor that the principal be required to give a new bond. No petition whatever was made in that regard. No such order to show cause was made or served. No account was rendered in obedience to such order. No new bond was given or approved pursuant to such order nor to any precedent order of the court. No former surety was released pursuant to hearing upon such petition or order to show cause. Sec. 4281*b* was not complied with in any essential respect. The proceedings taken do not purport to have been taken under, nor to have had any reference whatever to, that statute. The second bond makes no reference to that statute, and contains no reference to or recital of proceedings taken thereunder. The order of January 5, 1899, purporting to release the former sureties, contains no such reference or recital."

Prior to the giving of the bond in question this court held that:

"In absence of express statute (such as now exists in sec. 4281*b*, Stats. 1898), county courts have no power, either by taking a new bond or otherwise, to discharge sureties from liability for either past or prospective misconduct of an ex-

ecutor, administrator, or trustee; and a new bond, if taken, is merely cumulative." *Richter v. Estate of Leiby,* 101 Wis. 434, 441, 77 N. W. 745. To the same effect, *Rudolf v. Malone,* 104 Wis. 470, 80 N. W. 743.

Since no steps were ever taken as prescribed by statute to relieve the sureties or to discharge Otto as principal on the original bond, it is obvious that the bond in question must be regarded as an additional or cumulative bond, as mentioned in the statute. Sec. 3967.

It is conceded that the defendant company, as surety, is liable for the failure of Otto, as such guardian, to account for all moneys and property received by him as such guardian after the execution of the bond; but in the language of Mr. Justice TAYLOR above quoted, the defendant company "is equally liable for all money in the hands of the guardian belonging to the ward at the time the bond was executed." The bond expressly required Otto, as such guardian, (1) to make a true inventory of all the estate of his ward coming to his possession or knowledge, and turn the same into the county court within such time as the judge should order; (2) to dispose of and manage all such estate according to law and for the best interest of the ward, and faithfully discharge his trust in relation thereto; (3) to render an account, on oath, of the property of the ward in his hands, and all proceeds or interest derived therefrom, and of the management and disposition of the same, within the year therein stated, and at such other times as the court should direct; (4) and at the expiration of his trust to settle his account as therein directed, and to "pay and deliver all the property, real and personal, remaining in his hands, *or due from him* on such settlement, to the person or persons entitled thereto."

2. It appears that in his account of January 5, 1899, Otto did not make a true inventory of the estate, but gave himself a false credit, among other things, of a note dated October 26, 1897, executed by Herman Brehm, payable to Hugo Brehm, for $229, with interest at five per cent., which never belonged

to Jacob or his estate; also a note dated December 5, 1898, executed by Grashorn and payable to Otto for $500, with interest at five per cent., which never belonged to Jacob or his estate; also a note dated October 22, 1887, executed by Muller for $50, with interest at eight per cent., indorsed paid to October 22, 1892, scheduled as uncollectible and worthless, and not charged to Otto, but fraudulently credited to him. These three notes, amounting on their face to $779, were improperly credited to Otto in his account of January 5, 1899, and, for the reasons stated, the plaintiff was justified in refusing to receive them as part of the estate of Jacob. It must be presumed that the $779 with which Otto was so falsely credited in his account with the estate was either intended as the equivalent of that amount of money in the hands of Otto at the time of executing the bond of January 5, 1899, or that he had previously converted the same to his own use from the estate, and that in either view he had breached the bond by failing at the expiration of his trust to settle his account as therein prescribed, "and pay and deliver all the property, real and personal, remaining in his hands, *or due from him* on such settlement," as therein required. *Rudolf v. Malone,* 104 Wis. 470, 472, 80 N. W. 743; *Hutson v. Jenson,* 110 Wis. 26, 85 N. W. 689; *Choate v. Arrington,* 116 Mass. 552; *Benchley v. Chapin,* 10 Cush. 173; *Mattoon v. Cowing,* 13 Gray, 387; 15 Am. & Eng. Ency. of Law (2d ed.) 119, and cases there cited.

3. It appears that the note and mortgage dated January 5, 1899, executed by Otto, and payable three years after date to Jacob, for $5,500, with interest at five per cent., never came to the possession of the plaintiff in any capacity, although it was credited to Otto in his account of January 5, 1899, but was, on June 5, 1899, assigned by Otto to the bank as collateral security for the payment of his own indebtedness to the amount of $3,000. Such attempt of Otto to loan the funds of his ward to himself could not in any way lessen his liability, as such guardian, upon the bond in question, nor

the liability of his surety thereon. Thus it has recently been held by this court that "where a guardian ostensibly invested her ward's money in a loan to herself, giving notes and mortgages on her own property to her wards, the transaction cannot be treated as in any respect an investment of the trust funds." *Hutson v. Jenson,* 110 Wis. 26, 85 N. W. 689. The cases above cited are to the same effect. We must hold that upon Otto's removal as such guardian he was bound, as prescribed in the bond, to fully account for and settle for that note and mortgage, and "to pay and deliver" the amount thereof as "due from him on such settlement," as therein prescribed. Having failed to do so, the defendant company, as his surety, is answerable therefor.

4. So the note dated June 6, 1898, executed by De Wilde and Gagodnigg, and payable two years after date, at the bank, to the order of Otto, guardian of Jacob, for $2,000, with interest at six per cent., never came to the possession of the plaintiff in any capacity. The note was credited to Otto in his account of January 5, 1899, as $1,500, and it appears that $500 of the principal and the interest to June 6, 1899, were paid thereon after the account of January 5, 1899, but none of either of those payments ever came to the possession of the plaintiff in any capacity. The note was afterwards transferred by Otto to the bank, and was paid to the bank by De Wilde November 6, 1899. The facts stated in respect to that note show that the same was appropriated by Otto to his individual use, and hence, upon the principles already stated, constituted a breach of the bond for which Otto and the defendant company are liable. Other liabilities are conceded by counsel.

By the Court.—The judgment of the circuit court is affirmed.

A motion for a rehearing was denied March 14, 1905.

KERWIN, J., took no part.

STATE EX REL. SHAWANO COUNTY, Appellant, vs. SEXTON, Town Clerk, Respondent.

December 13, 1904—March 14, 1905.

Highways: Town-line road: Repair of bridge by county: Liability of town.

1. A road which had become a public highway by user and working was situated as near the town line as the nature of the ground would permit and, together with a bridge thereon, had been kept in repair by the adjacent towns jointly for a number of years. In a proceeding to compel one of the towns to collect by tax a portion of the expense incurred by the county in rebuilding such bridge, allegations of the above facts are *held* sufficient to show that the repair and maintenance of the bridge devolved upon said towns, without an allegation that the requisite steps were taken under secs. 1272, 1273, Stats. 1898, to lay out the highway as a town-line road.
2. To give a county jurisdiction, under sec. 1319, Stats. 1898, to aid towns in the repair and construction of bridges, the conditions prescribed by that section must be fulfilled by the towns; and where two towns are jointly liable for the maintenance of a bridge, *it seems* that their concurrent action is necessary to give the county jurisdiction.
3. Sec. 1311, Stats. 1898, authorizing counties to repair state or county roads under certain circumstances, has no application to other roads.
4. In order that a county may charge a town, under sec. 1338, Stats. 1898, with the cost of repairing a bridge, there must be a compliance with the essential requirements of that section; and in a *mandamus* proceeding to compel the town to insert the claim in the tax roll the petition of the county should show what the decision was from which an appeal was taken by the freeholders; what steps were taken to perfect the appeal; that the committee of the county board made the required examination and determination as to repairs; that the chairman of the board caused the repairs to be made; and, where two towns were chargeable with the cost of the repairs under sec. 1273, Stats. 1898, that such cost had been apportioned between them as provided in that section.

APPEAL from an order and a judgment of the circuit court for Portage county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

This is an action, brought on behalf of the county of *Shawano,* to compel the town clerk of the town of Waukechon to insert in the town tax roll a portion of the cost of rebuilding a bridge over the Wolf river, on an alleged town-line road between the towns of Belle Plaine and Waukechon in the county of *Shawano.* It is alleged and stated that for a period of nearly fifty years there has existed a public highway on the range line between section 1 of the town of Belle Plaine and section 6 of the town of Waukechon, and that for many years a bridge has existed across the Wolf river, either at the point where the range line intersects the river, or at a point about forty rods northwest of this place. It is further alleged that the first bridge constructed over the river was at the place where the present bridge is situated, and that after its destruction another was built on the range line; that this one existed for about eight years, until its destruction about 1870; that the present bridge was built at the narrow point of the river about forty rods northwest from the point where the former bridge on the range line was situated; that the bridge is a part of the town-line road, situated as near the town line as the nature of the ground will permit; that it was maintained by the towns jointly until, as alleged, the county board of *Shawano* county adopted this road, including the bridge, as a county road. The road and bridge were maintained by the county of *Shawano* until 1892, when the county board of supervisors passed resolutions declaring that the road and bridge should revert to the towns. By the terms of these resolutions the road and the bridges thereon in each town were to revert to the control of the respective towns. Notice of this action was given to the respective towns. The county of *Shawano* has neither appropriated money for nor repaired this highway since this action was taken. On June 14, 1899, the county board of supervisors adopted another resolution, which, in terms, declared that all county roads then existing should revert to the towns and villages in which they lay.

From the year 1892 to the year 1900 the road in question was kept in repair by the towns of Belle Plaine and Waukechon jointly. It is alleged that in the year 1900 this bridge was out of repair and dangerous to travel, which necessitated its being closed up as a part of the public highway. It is further averred that the town authorities of the town of Waukechon refused to have anything to do with the rebuilding and repair of the bridge, by refusing and neglecting to call a special meeting of the town, on the petition of twelve resident freeholders of the town, for the purpose of raising money to rebuild it; that the electors of the town at the annual town meeting took no steps toward repairing the bridge; and that the town authorities of Belle Plaine also refused to rebuild or repair the bridge unless the town of Waukechon pay part of the cost.

A further averment is that an appeal was taken from the refusal of the towns to aid in the repairing of the bridge to the county board, by fifteen freeholders, by serving notice on the chairmen of the towns. It is also stated that a written notice was served by six freeholders of the county, giving notice of the neglect of the towns to keep the bridge in a proper state of repair, and that the county clerk thereupon duly notified the town chairmen of the two towns to repair the bridge within thirty days from May 30, 1901, and that, upon their neglect to repair within thirty days, the repairs would be made by the county and the expense thereof would be charged to the towns; that a committee of three of the county board was appointed to examine the bridge and determine the need of repairing or rebuilding; and that it was found that the bridge should be rebuilt.

It is also alleged that the town of Belle Plaine petitioned the county for aid in the rebuilding of the bridge, and took immediate steps to raise money to pay its part (one fourth) of the cost; that the town of Waukechon neglected and refused to raise any money or to do anything towards the re-

building or repairing of the bridge; that the chairman of the county board and a committee thereof, in conjunction with the town officers of the town of Belle Plaine, rebuilt the bridge; that the county of *Shawano* paid one half of the cost and the town of Belle Plaine one quarter of the cost; that the other quarter of the cost, which amounted to $1,353.33, was charged by the county to the town of Waukechon, with directions to insert this amount in the tax roll for the year 1902; that the town clerk of Waukechon refused and neglected to insert this sum of $1,353.33 in the town tax roll; that at the next meeting of the county board a penalty of twenty-five per cent. was added to this amount, and the county clerk was instructed to certify this amount to the town clerk to be inserted in the tax roll for the year 1903; that the town clerk again refused and neglected to insert the amount in the tax roll of the town; and that the amount so certified to the town clerk, with the tax raised by the town, does not exceed the statutory or constitutional limitation.

This action is brought to compel the clerk of the town of Waukechon to insert this amount in the tax roll of the town. The defendant's demurrer to the petition was sustained, and judgment was entered dismissing the petition and the alternative writ of *mandamus*. This is an appeal from the order and judgment of the court sustaining such demurrer and dismissing the petition and alternative writ of *mandamus*.

F. A. Eberlein, attorney, and *M. G. Eberlein*, of counsel, for the appellant.

For the respondent there was a brief by *Wigman, Martin & Martin*, and oral argument by *P. H. Martin*.

The following opinion was filed January 10, 1905:

SIEBECKER, J. The defendant demurred to the petition upon several grounds, but submitted argument on the general demurrer only, suggesting that it is desired to test the sufficiency of the grounds upon which relief is sought by assum-

ing that it is the duty either of the town of Belle Plaine alone, or of the towns of Belle Plaine and Waukechon jointly, to keep this bridge in the proper state of repair for public travel. We shall therefore confine ourselves to the sole question, Does the petition, under such assumption, allege facts sufficient to constitute a cause of action for the relief demanded?

The contention is made that it is not shown that the road in question is a town-line road. True, there is no allegation that the requisite steps under secs. 1272, 1273, Stats. 1898, were taken to lay out this highway as a town-line road. It is, however, alleged that the highway has by user and working become a public highway, and that it is situated as near the town line as the nature of the ground will permit, thus giving it the location of a town-line road. Under the provision of sec. 1273 which declares that any bridge on such highway which "has not been assigned to either of the adjacent towns, shall be repaired and maintained by such towns and the cost of repairs and maintenance shall be paid by them in proportion to the valuation of the property therein as equalized by the county board or boards at the last equalization," it devolved upon the adjoining towns to repair and maintain the bridge. It is also alleged that the towns kept this road in repair jointly from 1892 to 1900. Under these circumstances the allegation must be held sufficient to charge, if the road reverted under the resolution of the county board (which question we do not decide), that the repair and maintenance of this bridge devolved upon these towns.

The town of Waukechon asserts that, if the duty to repair and maintain this bridge jointly with the town of Belle Plaine fell upon it, no grounds are alleged rendering it liable for the amount charged against it by the county. The petition states that the town of Belle Plaine asked to have the bridge built by county aid, as provided by sec. 1319, Stats. 1898, but this proceeding wholly failed, for none of the necessary conditions prescribed by this section to give the county

jurisdiction to extend aid to towns in the repair and construction of bridges were fulfilled by the towns; nor is any way suggested by which this object could be accomplished without the concurrent action of the two towns liable for its maintenance.

The authority conferred upon counties to repair certain roads, under sec. 1311, Stats. 1898, is also claimed to support the claim. This section clearly cannot be relied upon, for by it counties are given authority, upon certain conditions, to open and repair state and county roads in cases where towns, cities, or villages neglect or refuse to open or repair them as required by law. It is not shown, nor does relator, the county, or the defendant in this action claim, that this is a state or county road, to be kept in repair by the towns through which it passes; hence no grounds exist for recovery under the provisions of this section.

The only statutory provision under which the county can assert any right to the relief demanded is sec. 1338, which provides, in effect, that if any town, either by its proper officers or a majority vote of its electors voting on such question, shall refuse to repair any public highway or bridge in such town, any fifteen freeholders may appeal from such decision to the county board, and thereupon the county board shall examine such highway or bridge, and, if they shall determine that it ought to be repaired, the chairman of the county board shall cause it to be repaired, and keep an accurate account of the expense thereof, which, when audited and allowed by the county, shall be charged to such town and added to the next county tax apportioned thereto and collected therewith. The petition is fatally wanting in several respects to meet the conditions of this statute as the basis for the county's claim. It does not appear that any action or vote was ever taken by the town officers or its electors at a town meeting in reference to repairing or rebuilding this bridge; and, again, it is not alleged from what decisions, if any, an appeal was taken, nor

what steps were actually taken to perfect such an appeal. While it is alleged that the county board appointed a committee of three of its members to examine the bridge for the purpose of determining whether it needed repairs, it does not appear that this committee made the required examination and determination that the bridge ought to be repaired. Another condition of the statute is that, if repairs are decided to be undertaken by the county, the chairman of the county board shall cause them to be made, and shall keep an accurate account of the expense thereof, which shall be audited by the county board; while the petition states that the rebuilding of the bridge was in charge of, and carried out conjointly by, the chairman of the county board, its committee, and the town board of the town of Belle Plaine. This is clearly no compliance with the essential requirements of this statute. Nor is it anywhere alleged that the amount sought to be collected as expense for restoring this bridge from the town of Waukechon is apportioned between it and the town of Belle Plaine in proportion to the valuation of the property in these towns, as equalized by the county board at its last equalization. The failure to comply with all of these statutory requirements and provisions in attempting to charge the town of Waukechon with a portion of the cost of restoring this bridge is fatal to this action.

We are of the opinion that the trial court ruled correctly in holding that *Shawano* county had no jurisdiction to levy the tax in question, and that the judgment dismissing the petition and the alternative writ of *mandamus* was properly awarded, with costs.

By the Court.—The order and judgment are affirmed.

A motion for a rehearing was denied March 14, 1905.

KERWIN, J., took no part.

HUBER, Respondent, vs. STARK and another, Appellants.

December 14, 1904—March 14, 1905.

Adjoining landowners: Projection of eaves over boundary line: Continuing trespass: Remedies: License: Revocation: Discharge of rainfall on land of another.

1. An encroachment by one person into the domain of another, that other not being prejudiced in the occupancy of his land up to the boundary line between the two, as for example by such person projecting the eaves of his building over the boundary line, is remediable at the suit of such other to enjoin as a continuous trespass.
2. It is no ground for mitigation of damages caused to the property of one person by a trespass thereon that if such property had been in a good state of repair the wrongful invasion would not have damaged it.
3. If one person without consideration verbally grants the use of his land to another, regardless of whether when the permission is given the parties contemplate that the privilege will be permanent, and whether such other enters upon the land and expends money thereon to facilitate the enjoyment of such privilege, the transaction creates only a mere license revocable at the pleasure of such person.
4. "No one has a right, by an artificial structure of any kind upon his own land, to cause the water which falls and accumulates thereon in rain or snow to be discharged upon the land of an adjacent proprietor. Such an erection, if it occasions the water to flow either in the form of a current or stream, or only in drops, works a violation of the adjoining proprietor's right of property, and cannot be justified, unless a right is shown by express grant or by prescription."

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Columbia county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The facts as found by the trial court, within the issues made by the pleadings, were as follows:

Plaintiff and defendant during the time stated in the complaint, and at the time of the trial, were owners of adjoining buildings. The partition wall was partly on the premises of

each. Up to the summer of 1902 such wall extended above plaintiff's roof upwards of ten feet and above defendant's roof upwards of two feet, and the construction was such that the water from the latter's building flowed therefrom to his own ground. During such summer he constructed on the rear portion of his building, extending some twenty-five feet towards the front thereof, an addition called a rigging loft. In so doing it became necessary to take down the wall above the old roof from the front of the building back to the space covered by the new construction. He did so and extended his roof over the wall on plaintiff's side so that water deposited on the former's roof necessarily flowed onto the premises of the plaintiff. For the purpose of controlling the manner of such flow defendant attached a trough to the partition wall near the top thereof and on plaintiff's side, extending the same back to the aforesaid new construction and connecting it at that point with a pipe conductor extending along on plaintiff's side of such wall to the rear thereof and thence to the ground, thereby causing the water to flow from the former's roof in a body to the premises of the plaintiff at the foot of such pipe. Plaintiff verbally consented to that arrangement when the trough and connections were erected. In constructing the rigging loft it became essential to close up a chimney located in the partition wall, which plaintiff had a right to have permanently maintained. To that end it was mutually agreed between the parties that defendant might close up the chimney on condition of his building a new one at a place agreed upon for the joint use of the parties, which was done.

By reason of the arrangement aforesaid for conducting the water from defendant's roof to the ground, water at times flowed from his roof in such volume as to overload the trough or it flowed over the same and fell upon plaintiff's roof. Occasionally the trough filled up with ice, causing water to flow upon plaintiff's roof, and in consequence ice formed thereon.

By reason of the insufficiency of the arrangement water from defendant's roof injured plaintiff's building to a considerable extent. November 24, 1902, plaintiff notified defendant to discontinue such arrangement, to remove the trough and its connections from the wall, and to so control the flow of water from his building as to prevent the same from going on to the premises of the plaintiff. He neglected to comply with such request and thereupon this action was brought. Plaintiff was injured by reason of water flowing from defendant's roof to his in the manner aforesaid, in the sum of $50 subsequent to the 24th day of November aforesaid.

On such facts the court held that the only right which defendant had to permit the water from his building to flow on to plaintiff's premises, and to maintain a trough and its connections to carry the water to the ground in the manner stated, was a license revocable at the plaintiff's pleasure; that the notice to remove the trough and connections and to cease allowing the water to flow from defendant's building to that of the plaintiff and on to the latter's premises was a revocation of such license; that the maintenance of the trough and its connections and permitting the water to flow from defendant's roof to that of plaintiff was a continuous trespass, which plaintiff was entitled to have abated; that plaintiff was entitled to have judgment accordingly, and enjoining defendant from further maintaining the trough and its connections, and from further permitting the water to flow from his building to the premises of the plaintiff, and judgment requiring defendant to restore plaintiff's building to its former condition by removing therefrom the said trough and its connections, and for $50 damages and costs. Judgment was so rendered, from which this appeal was taken.

Daniel H. Grady, for the appellants.

For the respondent there was a brief by *Fowler & McNamara,* and oral argument by *C. W. Fowler.*

The following opinion was filed January 10, 1905:

MARSHALL, J. Counsel's first contention is that respondent should have sued in ejectment and that, as proper objections were made and exceptions to rulings saved to present that question here, a reversal should be granted for failure to invoke the proper jurisdiction.

Whether the invasion by one of the domain of another by that one projecting the eaves of his building over the premises of such other, or by any intrusion into the latter's domain, as by projecting a foundation stone beyond the boundary, such other being in no wise disturbed in the occupancy of his own land up to such boundary, is remediable in equity to compel a discontinuance thereof, or by an action for damages as for a trespass, has been solved in the affirmative in some jurisdictions (*Aiken v. Benedict,* 39 Barb. 400; *Vrooman v. Jackson,* 6 Hun, 326; *Meyer v. Metzler,* 51 Cal. 142; *Grove v. Fort Wayne,* 45 Ind. 429), and in the negative in others (*Sherry v. Frecking,* 4 Duer, 452; *Murphy v. Bolger,* 60 Vt. 723, 15 Atl. 365). It seems that the conflict created in respect to the matter in the New York court at an early date is yet unsolved. *Leprell v. Kleinschmidt,* 112 N. Y. 364, 19 N. E. 812. Probably it is true, as said in 10 Am. & Eng. Ency. of Law (2d ed.) 531, the weight of authority is in favor of the remedy in ejectment, but this state is committed to the doctrine that if, notwithstanding the encroachment, the owner of the premises invaded really occupies up to his boundary line, the proper action to redress the interference is one for damages, or to abate the aggression as a continuing nuisance. *McCourt v. Eckstein,* 22 Wis. 153; *Zander v. Valentine Blatz B. Co.* 95 Wis. 162, 70 N. W. 164; *Rahn v. Milwaukee E. R. & L. Co.* 103 Wis. 467, 79 N. W. 747; *Rasch v. Noth,* 99 Wis. 285, 74 N. W. 820. That, it would seem, would rule this case, if the proposition as to the precise facts were new, but it was seemingly so held in

Rasch v. Noth, supra. That was a case of overhanging eaves, and judgment in ejectment was reversed upon the ground that the action should have been in equity to abate a nuisance, or for damages for trespass. In *Rahn v. Milwaukee E. R. & L. Co., supra,* a similar invasion was held to satisfy the rule as to the use of equity jurisdiction to abate a continuing trespass.

Exceptions are urged to several findings of fact as contrary to the clear preponderance of the evidence. It does not seem advisable to discuss the evidence for the purpose of demonstrating the correctness of our conclusion in regard thereto. As we read the record, there is ample evidence to warrant the findings. Counsel view some of them from a radically wrong standpoint. It is said that appellant justified under an oral agreement and the court found such agreement as pleaded, and so should have decided that all interferences complained of were covered by the consideration acquired by respondent in respect to the new chimney. We are unable to find that the court decided that the agreement was made as pleaded. On the contrary, the decision is to the effect that there was no consideration passing between the parties, except as regards the chimney. The same infirmity appears in counsel's criticism of the court's assessment of damages. This inquiry is made: The court having found the agreement as alleged, "how could damages be possibly assessed for injuries naturally caused in the execution of it?" That is based on the false assumption as to the decision upholding the agreement pleaded. Again, it is said, plaintiff's roof was out of repair, else no damage would have been caused thereby from the source complained of. Manifestly, it is no ground for mitigation of damages caused to the property of one person by a trespass thereon that if such property had been in a good state of repair the wrongful invasion would not have damaged it. Some other criticisms of the findings made by the learned counsel might be referred to, which in our view furnish as

little ground for disturbing the judgment as those we have instanced.

It is insisted that the conclusion of law that appellant had no better right to erect and maintain the eave trough than a mere license is wrong, because there was something more than such a right involved, in that the privilege was granted in exchange for a consideration, possession was taken of respondent's property, so far as necessary, to enjoy such privilege, and it was expected that it would be permanent. The premise assumed, that there was a consideration given for the privilege, is untenable, as we have seen. It follows that the assignment of error based on such premise is likewise untenable.

It is further contended that, conceding the facts as to the agreement between the parties being as found by the court as respondent views such finding, the indications are that it was supposed at the time the agreement was made that the privilege granted to appellant would continue indefinitely, and changes were made in the buildings in harmony therewith, in which circumstances the privilege is more in the character of an easement than a mere license, and therefore was not revocable at the pleasure of the grantor, *Morrill v. Mackman,* 24 Mich. 279, being referred to. That case has no analogy to the one in hand. The privilege there involved was orally granted upon the promise of an annual money consideration. It was said that if the agreement had been put in writing the result would have been a tenancy, and since it was not it was good as a lease from year to year. The inference plainly is that the controlling feature in the case was the consideration agreed to be paid. True, it was suggested that the attitude of the parties was such as to indicate a mutual understanding that the privilege would be permanent, but it seems plain such feature of itself would not turn a license into an easement or a lease. We should take note in passing that in *Thoemke v. Fiedler,* 91 Wis. 386, 64 N. W. 1030, Mr. Justice NEWMAN,

speaking for the court, in discussing the question of whether a parol license of the sort under consideration can be enforced in equity, used an expression quite similar to that above referred to and in a way that might give rise to the belief that the duration of a mere license as viewed by the parties thereto at the time of the creation thereof would, or might, control as to whether it is revocable at the pleasure of the licensor or not. This is the expression to which we refer:

"The case is entirely bare of evidence showing whether such privilege was intended to be perpetual or limited in duration."

That was a mere passing remark. Probably the effect thereof, as it might be viewed apart from the general principle which ruled the case, was not appreciated. Certainly, whether at the inception of a mere license to one to enjoy some privilege in the land of another the parties thereto assume or agree that it shall be permanent does not affect its revocability.

The true rule is that a mere verbal permission by one to use the land, to some extent, of another, no consideration being paid therefor, though that other, on the faith thereof, enters upon such land and makes valuable improvements thereon to enable him to enjoy such permission, conveys no interest in the land and no right which, as to acts done by him after his privilege shall have been revoked, can be successfully asserted, defensibly or otherwise, as against the owner of the premises. *Thoemke v. Fiedler,* 91 Wis. 386, 64 N. W. 1030; *Fryer v. Warne,* 29 Wis. 511; *Tanner v. Volentine,* 75 Ill. 624; *French v. Owen,* 2 Wis. 250; *Clute v. Carr,* 20 Wis. 531; *Duinneen v. Rich,* 22 Wis. 550.

The further point is made that a license is a full defense to all acts done pursuant thereto. We fail to find anything in the decision of the trial court not in harmony with that principle. The acts for which the redress was sought, and granted, are those committed after the license was revoked.

The next point made is that the judgment erroneously enjoined appellant absolutely from allowing water from his roof to flow on to the building or premises of the respondent. Whether one has any right whatever to turn water accumulated on his building on to the premises of another, either in a stream or through a spout, or in drops, the modern authorities are not in harmony. This court does not appear to have heretofore spoken decisively on the question. In some jurisdictions it is held that one so turning water on to the premises of another is responsible for actionable wrongdoing only if he acts negligently to the damage of his neighbor. *Underwood v. Waldron,* 33 Mich. 239; *Barry v. Peterson,* 48 Mich. 263, 12 N. W. 181; *Hazeltine v. Edgmand,* 35 Kan. 202, 10 Pac. 544; *Armstrong v. Luco,* 102 Cal. 272, 36 Pac. 674. Elsewhere the rule is that one property owner is entitled to absolute immunity from having water cast upon his premises from the adjoining building owned by his neighbor. In those cases, while the gist of the actions for violating such right is negligence, it is held that the wrong does not consist in allowing the water accumulating on the premises of one to be cast on to the adjoining premises negligently, but in allowing it, at least with knowledge of the facts, to be so cast at all. *Martin v. Simpson,* 6 Allen, 102; *Tanner v. Volentine, supra; Fitzpatrick v. Welch,* 174 Mass. 486, 55 N. E. 178; *Shipley v. Fifty Associates,* 106 Mass. 194, 198; *Jutte v. Hughes,* 67 N. Y. 267, 272.

In the last case cited the trial court instructed the jury that "if the water did come from the defendant's yard and he did everything which was possible, under the circumstances, and practicable in the way of drainage to carry it off from the premises, he was not liable." The facts were that defendant paved his yard so that the water falling thereon, which came from the building or otherwise, flowed over such pavement on to the premises of the plaintiff. The instruction was condemned on appeal, the record showing that the circumstances

referred to were in part created by the defendant and naturally caused the water that fell on his premises to flow onto those of his neighbor, the court remarking:

"He was bound to take care of such water as fell and accumulated upon his own premises, and to prevent its causing any injury to the property of the plaintiff. It matters not that defendant did all that he reasonably could to take the water off, if he suffered it improperly to increase on his own premises, and so as to flow onto the plaintiff's premises."

In *Martin v. Simpson, supra,* BIGELOW, C. J., speaking on the same subject, said:

"No one has a right, by an artificial structure of any kind upon his own land, to cause the water which falls and accumulates thereon in rain or snow to be discharged upon the land of an adjacent proprietor. Such an erection, if it occasions the water to flow, either in the form of a current or stream, or only in drops, works a violation of the adjoining proprietor's right of property, and cannot be justified, unless a right is shown by express grant or by prescription."

Such doctrine seems much more consonant with the common-law rights of property than that of the Michigan court, which seems to be to the effect that there must be, in the nature of things, a sort of neighborly exchange of privileges between the owners of adjoining buildings, permitting each, if he acts with due care, to use the premises of the other as a dumping place for the water accumulating upon his own building.

The right of eavesdrip which one may possess in the land of his neighbor is an interest in realty,—an easement, and hence does not exist in any case as a mere appurtenance. It is a property right which must be acquired like any other interest in land—the *stillicidium* as regards the fall of water in drops and *flumen* as to flow of water in a stream from a spout or gutter, as the subject is treated in the civil law. The ancient rule on the subject, which cannot well be ignored without judicially taking property of one person and conferring

it on another without compensation, is stated by Mr. Washburn thus:

"For one to construct the roof of his house in such a manner as to discharge the water falling thereon in rain, upon the land of an adjacent proprietor, is a violation of the right of such proprietor, if done without his consent, and this consent must be evidenced by express grant or prescription. . . . The mode in which this injury may be occasioned may be by extending the roof of such building beyond the line of separation between the two estates, or by so constructing it as to throw the water falling thereon, by its own impulse and direction, across the line, and thereby causing it to be discharged upon the estate of the adjacent landowner." Washburn, Easements, *390.

It is strenuously contended that a licensor cannot upon revoking the license rightly compel the licensee to restore the original condition of the premises. If counsel speak only of restoration to the extent of merely terminating the trespass caused by adversely exercising the license after its revocation, he is manifestly wrong. That is all the mandatory part of the judgment is designed to accomplish in this case. It does not require the restoration of any structure, but merely requires appellant to cease trespassing upon respondent's premises by discontinuing the eave spout and its connections and cease permitting the water to flow from his roof on the respondent's premises.

Some other suggestions are made by appellant's counsel, but they either are quite unimportant or are so fully covered by what has been said that we will forego further discussion of the case.

By the Court.—The judgment is affirmed.

A motion for a rehearing, and for a modification of the judgment with respect to the removal of structures and restoration of plaintiff's building, was denied March 14, 1905.

KERWIN, J., took no part.

EMERSON and another, Respondents, vs. NASH and others, Appellants.

February 1—March 14, 1905.

(1-13) *Pleading: Liberal construction: Demurrer: Indefiniteness: Joinder of causes: "Same transaction:" "Same subject of action:" Primary rights.* (14) *Contract to obtain options on land: Performance: Waiver.*

1. "In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed, with a view to substantial justice between the parties." Sec. 2668, Stats. 1898.
2. "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party." Sec. 2829, Stats. 1898.
3. Applying the foregoing to a pleading on demurrer thereto every reasonable intendment and presumption is to be made in favor thereof for the purpose of supporting it. All unfavorable constructions are to be deemed subordinate to those which are reasonably otherwise, and all essentials are to be regarded as sufficiently stated which can by reasonable construction and inference be discovered in the language used.
4. A pleading is never to be condemned on demurrer for mere indefiniteness or uncertainty. The proper remedy therefor is a motion to make it more definite and certain.
5. The terms of sec. 2647, Stats. 1898, "The plaintiff may unite in the same complaint several causes of action, whether they be such as were formerly denominated legal or equitable, or both, where they arise out of the same transaction or transactions connected with the same subject of action," should be liberally construed according to the rule as to remedial laws.
6. To constitute a cause of action there must be a right possessed by one or more persons and a violation thereof by another or others. The basic element is commonly called a "primary right."
7. The "primary right" spoken of is not the transaction of the statute. That is distinct from the immediate elements of the cause of action, since the latter arise out of the former.
8. A circumstance in which two or more persons are concerned, involving two or more remediable rights, constitutes the point of unity at which several possible causes of action may unite.

Two or more causes of action may arise therefrom by violations of two or more of such rights, each right being primary in the sense that when violated the two essential elements of a cause of action constituting a wrong to be remedied exist.

9. When several such violated primary rights have such proximate relation to a major circumstance that it may reasonably be said that in the regular course of events the latter is the source of the former, then several causes of action arise out of such circumstance, within the meaning of the statute, and such circumstance is the transaction of the statute.

10. Any event in which two or more persons are actors, involving a right which may presently, or by what may proximately occur in respect thereto, be violated, creating an actionable wrong, is a transaction within the meaning of the statute. All such wrongs, which in the regular course of events through the rights violated have such proximate relation to that transaction that it may be legitimately said they arise out of it, are redressible in one action regardless of the form of the remedy requisite as to each, providing they affect all the parties and do not require different places of trial.

11. The term "transactions connected with the same subject of action" refers to a different situation than "causes of action arising out of the same transaction." The former applies generally, if not exclusively, to matters which might constitute a source of independent causes of action, yet is so germane to the primary matter, the suit being in equity, as to be regarded really a part thereof.

12. The term "primary right" used as a designation of that which, when violated, will constitute a ground for judicial redress, may in an equitable action include other rights which are also primary in the sense that they might constitute separate grounds of complaint, but which by reason of their relation to the dominant purpose of the suit are deemed to be embodied therein.

13. When a contract between two or more persons on one side and two or more persons on the other creates a situation involving presently or proximately separate rights upon one side, each of which, with a violation thereof by the other side, would constitute a complete ground of complaint for judicial redress, the initial circumstance,—the making of the contract,—is a "transaction," within the meaning of the statute, and such grounds of complaint, should they arise, would be separate "causes of action arising out of the same transaction," within the meaning of the statute.

14. If a person contracts with another to obtain options for that

other to purchase real estate in case he shall upon examination thereof elect to do so, and such person pursuant to his obligation negotiates with a third person to obtain such an option and thereby brings to such other's attention the subject of the transaction in aid of enabling him to obtain the land if he desires to do so, and before a formal option shall have been obtained such other concludes to make the purchase and does so, he thereby becomes liable to such person as upon a full performance of his agreement.

[Syllabus by MARSHALL, J.]

APPEALS from orders of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

The following is the substance of those parts of the complaint necessary to be examined in deciding the questions raised by the appeal:

(1) February 5, 1901, plaintiffs, by an agreement in writing with defendants *Thomas E. Nash* and *Guy Nash,* which which will be denominated hereafter the original contract, bound themselves to convey to said defendants, at their option, on or before April 15, 1901, certain specified lands in Ashland county, Wisconsin, at $5 per acre cash, the seller to furnish complete abstracts of title before sale.

(2) Plaintiffs therein also agreed to use their best ability to obtain for such defendants all lands in townships 40 and 41, ranges 3 and 4, and the west one-half of range 2 west, in Ashland, Sawyer, and Price counties, on which the former had options, which the latter should elect to buy at the net option price, or such better terms as could be secured of the owners, plus five per cent. to be paid said plaintiffs for their services and expenses; and further agreed to use their best endeavors to obtain the necessary extensions of such options to enable said defendants to inspect the lands, and to procure abstracts of such lands without expense to the defendants; copies of which options were attached to the contract and marked "A," "B," "D," and "E."

(3) Plaintiffs further therein agreed to serve the said defendants to the best of their ability for two years, if neces-

sary, in procuring options in their names, for the benefit of and on the best terms obtainable for said defendants, on all other lands in towns 41 and 42, in ranges 3 and 4, and the west half of range 2 west in Ashland county; the north two-thirds of town 40, ranges 3 and 4 west in Sawyer county; the north two-thirds of town 40 of the west half of range 2 west in Price county; said defendants to pay five per cent. commission on the purchase price of all lands which they should elect to accept. Such price to include cost of procuring original and tax titles when both were required, the cost of legal services and court and officers' fees to be borne by said defendants where the plaintiffs should be unable to get the vendors to bear the same.

(4) June 15, 1901, the time for said defendants to elect under the options was extended to September 1, 1901.

(5) Before September 1, 1901, the price for the lands mentioned in paragraph 1 was reduced to $4.50 per acre.

(6) About September 1, 1901, said defendants elected to take said lands mentioned, and a binding contract in respect thereto was made.

(7) Thereafter and before September 26, 1901, said defendants assigned to defendants *James B. Nash* and *William F. Vilas* a one-half interest in the completed contract aforesaid, so that it subsisted between plaintiffs on one side and all of the defendants herein on the other.

(8) About September 26, 1901, to correct errors in the original contract and enlarge its scope, plaintiffs and defendants made articles of agreement which thereafter with said contract as corrected constituted and were treated as one entire agreement.

(9) By the first of said articles it was provided that the completed contract of purchase should embrace certain specified lands in town 41, ranges 2 and 3 west, and town 42, range 2 west.

(10) Therein by the second article it was agreed by the

plaintiffs to sell and convey by deed with full covenants to said defendants, if the latter should so elect within ninety days, at $3.50 per acre, the seller to furnish abstracts of title, certain specified lands in Ashland county, Wisconsin.

(11) Therein by the third article plaintiffs agreed for $2.50 per acre to sell and convey to said defendants, by deed with full covenants, and to furnish abstracts of title, if the latter should so elect within ninety days, certain specified lands in Ashland county, Wisconsin.

(12) Therein by the fourth article plaintiffs agreed to likewise sell and convey to defendants, if they should elect within ninety days, certain lands in township 41, range 4 in Ashland county, Wisconsin, at $90 per forty, subject to taxes of 1898, 1899, and 1900, and to furnish abstracts of title at the expense of said defendants.

(13) Therein by the fifth article it was stipulated that the second, third, and fourth articles should be deemed independent agreements, and so far as defendants should elect to buy lands mentioned in any of such articles, they should pay in addition to the price per acre agreed upon, and at the time of the payment thereof, five per cent. as additional consideration.

(15) Said articles of agreement acknowledged payment of $7,500 on lands in article 1, and $26,600 on lands that might be taken under any of the articles, any excess over the purchase price for lands taken to be repaid with interest from the date of the advancement.

(16 and 18) It was further agreed in such articles that plaintiff should by such lawful means as might be necessary procure the title to be vested in defendants to all lands mentioned in article 1.

(17) In order to comply with that obligation and to secure performance of all agreements and covenants on their part, plaintiffs agreed to and did deliver to defendants their deeds of conveyance with full covenants covering certain specified lands.

(19) Plaintiffs further agreed in such articles to likewise deliver deeds of lands mentioned in the fourth of said articles within ten days after procuring title thereto.

(20) It was therein further agreed as to the deeds so delivered as security that the acceptance thereof should not be deemed an exercise of the option to purchase lands described therein, but that upon the exercise of such option said deeds should be deemed absolute.

(21) It was therein further agreed that so fast as the title to lands mentioned in the first article should be perfected in said defendants, the stipulated price therefor should be deemed paid out of the money advanced by the defendants as aforesaid, and that when the entire advancement of $34,100 should thus have become applied, including the application of any part to lands described in articles 2, 3, and 4, if defendants should have elected to buy any of such lands, then there should become due plaintiffs, as fast as they should perfect title to more of said lands described in said first article, the like ratable price as agreed upon, the same to be paid as the same should become due, subject, however, to the performance of all plaintiffs' agreements contained in said articles, as security for which defendants were privileged to retain a reasonable amount thereof.

(22) Plaintiffs therein further agreed to perfect title in said defendants to the lands mentioned in the first article as speedily as possible, and that if any were not so treated within two years, the rights of parties should be adjusted and any sum due from one side to the other be paid.

(23) It was therein further agreed that upon a settlement being made between the parties at any time, plaintiffs having fully performed their obligations and defendants elected not to exercise their option as to any of the lands conveyed to them as security, the same should be reconveyed.

(24) It was therein further agreed that if defendants elected to buy any of the lands mentioned in the second, third,

or fourth of such articles they should be liable for the taxes thereon of 1901.

(25) November 18, 1901, defendants duly elected to purchase the lands mentioned in articles 2 and 3, and the prior deeds thereof to them thereupon became absolute. About December 20, 1901, all agreements in respect thereto on plaintiffs' part were fully performed, whereupon the purchase price of the lands according to the contract, being $2,000 and five per cent. additional, became due to them.

(26) About December 20, 1901, said defendants duly elected to purchase the lands described in the fourth article. On January 10, 1902, plaintiffs fully performed all their obligations in respect thereto, whereupon there became due to them under said articles $1,800, and five per cent. thereof and of the $278.18 taxes paid by defendants, and $17.50, cost of abstract; in all $1,921.41.

(27) Plaintiffs performed all their obligations under the written contract and articles, and caused to be vested in defendants, prior to January 15, 1902, title to all lands mentioned in article 1, except 320 acres.

(28) About January 15, 1902, plaintiffs furnished defendants abstracts of title showing the facts last alleged.

(29) By reason of such facts there became due to plaintiffs by January 15, 1902, for lands mentioned in article 1, $52,464.25.

(30) About the date last mentioned defendants refused to pay any further sum on any of the lands, but induced plaintiffs to believe that if they would obtain a judgment quieting title as to certain alleged adverse claims, which did not exist in fact, they would fully perform their part.

(31) By reason of such inducement, plaintiffs, by due course of law, obtained a judgment as to such alleged adverse claims, and obtained quitclaim deeds as to some of them.

(32) About April 24, 1902, plaintiffs caused abstracts of title to the lands mentioned in article 1 to be brought down to

date, and delivered the same with a certified copy of the aforesaid judgment to defendants, and demanded payment of the money then due upon such original contract and articles.

(33) Ample time was given defendants to pass on said abstracts after said April 24th, but they refused to pay plaintiffs any part of what was then due.

(34) April 25, 1902, plaintiffs finally perfected title in defendants to all of the lands mentioned in article 1.

(35) June 14, 1902, plaintiffs delivered to defendants abstracts of title showing the facts aforesaid, whereby there became due to the former for the 320 acres of land aforesaid, $1,440, and the whole purchase price of the land mentioned in articles 1, 2, 3, and 4, not previously due, also then became due.

(36) About June 5, 1902, all deeds from defendants to plaintiffs, or procured by the former to be given to the latter, were duly delivered to the register of deeds of Ashland county, Wisconsin, for record, and were duly recorded, since which time defendants have asserted ownership to all lands affected by such deeds.

(37) After opportunity was given defendants to examine the abstracts as stated, plaintiffs to further satisfy said defendants, at their request, caused new abstracts of title to be prepared by their own agent and performed other acts to the end that all complaints on their part in respect to the title might be removed, which new abstracts were accepted by defendants before November 30, 1902.

(40) There is due plaintiffs from defendants under the terms of the original contract and articles, after allowing for all advances and all other proper credits, a balance of $23,516.33.

(41) The amount stated became due for lands mentioned in articles 1, 2, 3, and 4, and plaintiffs are entitled to a lien thereon to secure the payment of said sum. The value of said lands consists, in the main, of timber thereon, which defend-

ants, unless enjoined by the court, will cut and remove, thereby impairing the said right of lien.

(42) August 6, 1901, defendants duly elected, under said original contract and articles, to purchase the lands mentioned in the option referred to in the articles as Exhibit A for $7,512, whereby there became due to plaintiffs a commission thereon of five per cent., less a part thereof received from the grantors, the balance being $200.

(43) February 8, 1901, pursuant to said original contract, plaintiffs arranged for the purchase by the defendants, at their option, of certain lands in Ashland county, which pursuant to such contract and such arrangement defendants purchased for $2,692.70, whereby they became indebted to the plaintiffs for $135.64 as a five per cent. commission.

(44) Further pursuant thereto, February 8, 1901, plaintiffs procured an option for defendants on lands known as the Swift lands, which was thereafter exercised at $2,880, whereby they became indebted to plaintiffs for $144 as commission.

(45) Further pursuant thereto said defendants elected to purchase lands under the option referred to as Exhibit B, and the contract was fully consummated by vesting the title to said lands in said defendants for $4,860, whereby there became due to the plaintiffs under such original contract $243 as commission.

(46) Further pursuant thereto about December 16, 1901, defendants elected to take the lands referred to in such option, Exhibit B, and the title thereto was vested in them for $1,400, whereby under said original contract there became due plaintiffs $70 as commission.

(47) Further pursuant thereto, February 8, 1901, plaintiffs commenced negotiations to obtain for defendants options to purchase lands in Sawyer county, known as the Mississippi River Logging Company lands, and thereafter served defendants to that end with the result that July 9, 1902, they be-

came owners of said lands for $17,600, whereby there became due to plaintiffs from defendants, under said original contract, $880 commission.

(50) There is due plaintiffs from defendants under the terms of said original contract, as commission, $1,671.64, with legal interest as follows:

On $200, from August 6, 1901.

On $134.64, from November 10, 1901.

On $144, from November 15, 1901.

On $243, from December 15, 1901.

On $70, from December 16, 1901.

On $880, from July 9, 1902.

Judgment was demanded as follows:

1. For $23,516.33, as purchase money of lands in articles 1, 2, 3, and 4, with interest as claimed.

2. That the same, with costs, be adjudged a lien on such lands, to be enforcible as the court might direct.

3. That defendants be enjoined, pending the litigation, from conveying any of the lands to third persons or impairing the value thereof.

4. For $1,671.38, for the commissions aforesaid, with the interest thereon as stated.

5. For such other and further relief as the court may deem proper.

The defendants *James B. Nash* and *William F. Vilas* demurred to the complaint, first for insufficiency, second for improperly uniting several causes of action, third for insufficiency of facts as to the first cause of action attempted to be set forth, fourth for insufficiency of facts as to the cause of action attempted to be set forth in paragraph 42, also as to that attempted to be set forth in paragraph 43, also as to that attempted to be set forth in paragraph 44, also as to that attempted to be set forth in paragraph 45, also as to that attempted to be set forth in paragraph 46, also as to that attempted to be set forth in paragraph 47.

The defendants *Thomas E. Nash* and *Guy Nash* demurred to the complaint upon the ground above stated.

The demurrers were overruled. From the orders accordingly entered an appeal was taken to this court by defendants *Thomas E. Nash* and *Guy Nash,* and an appeal was likewise taken by defendants *James B. Nash* and *William F. Vilas.*

Burr W. Jones, for the appellants.

For the respondents there were briefs by *J. W. Hicks* and *James O'Leary,* attorneys, and *Reid, Smart & Curtis,* of counsel, and oral argument by *J. W. Hicks* and *James O'Leary.*

MARSHALL, J. We have examined with care the very able analysis of the complaint by appellants' counsel without being able to reach the conclusion they contend for. The case is by no means clear, and if it were proper to incline to a view which would condemn the pleading because such view is reasonable, there being another such view that will sustain it, a conclusion might be arrived at fatal to the orders appealed from.

We cannot too often recur to the radical change wrought by the Code from the common-law rule for determining the sufficiency of pleadings. It must not be forgotten that he who challenges a pleading for insufficiency in any respect cannot rely for success upon mere failure to state expressly or clearly facts essential to sustain it,—not in case of conflicting reasonable inferences upon that one being adopted supporting his contention. Formerly, mere ambiguity, resolvable reasonably in a way to defeat a pleading, was sufficient to that end upon the matter in that regard being presented on demurrer. The pleading was required to stand the test of every reasonable intendment and presumption against it. *Morse v. Gilman,* 16 Wis. 504. That was one of the serious obstacles to the speedy, economical, and efficient administration of justice, which the Code was designed to remove. Because of the inclination of

many judges against invasions of the ancient methods of presenting controversies for judicial determination, early manifested after the adoption of the new system, in respect thereto, which has never been wholly changed, though the new system is over half a century old, the full scope of the reform wrought thereby is not yet universally fully appreciated.

"In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed, with a view to substantial justice between the parties." Sec. 2668, Stats. 1898.

"The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party." Sec. 2829, Stats. 1898.

That language is unmistakable. Together with the whole framework of the Code it shows that the guiding thought of the reformers was that the attainment of justice, the end sought in all litigation, should be wholly free from all interferences in the nature of mere technicalities and illiberal constructions. In harmony with that the statute was very early given a broad and liberal construction to the end that the beneficent purposes thereof might be fully realized. This court declared that "every reasonable intendment and presumption is to be made in favor of a pleading."

"A complaint to be overthrown by a demurrer or objection to evidence, must be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if a good cause of action can be gathered from it, it will stand, however inartificially these facts may be presented, or however defective, uncertain or redundant may be the mode of their statement." *Morse v. Gilman, supra.*

Notwithstanding that plain declaration so early made, it has not always been appreciated and applied by judges, and it has often been lost sight of by counsel in the presentation of causes on appeal. The phrasing of the statutory rule by DIXON, C. J., which we have given, has not been materially

improved upon in the numerous elaborations thereof found in our decisions, though, perhaps, it has been thereby re-enforced. In *Miller v. Bayer,* 94 Wis. 123, 68 N. W. 869, the court said, in effect, that the true test to apply to a pleading is, Will the language used permit of a reasonable construction which will sustain it? In *Ean v. C., M. & St. P. R. Co.* 95 Wis. 69, 69 N. W. 997, it was said, in effect, that for the purpose of sustaining a pleading it should have the support of the most liberal construction which its language will reasonably bear, and all reasonable inferences that can be drawn therefrom. Again the court said, substantially, in *Kliefoth v. N. W. I. Co.* 98 Wis. 495, 74 N. W. 356, that effect should be given to all allegations of a pleading which will support rather than defeat it, if that can be done without adding thereto, by way of construction, material words not necessarily implied, or giving to the language used a meaning that cannot be reasonably attributed to it. And again in *Miles v. Mut. R. F. L. Asso.* 108 Wis. 421, 427, 84 N. W. 159, 162, the court said:

"Criticisms of a pleading will not support a challenge for insufficiency to state a cause of action or defense, if sufficiency can be discovered reasonably by judicial construction of the language used and by reasonable inferences from general allegations. Such pleadings may be open to a challenge for uncertainty and indefiniteness, but not insufficiency."

And recently in *Manning v. School Dist. No. 6, ante,* p. 84, 102 N. W. 356: Every pleading is to be so construed as to support the purposes of the pleader to state a cause of action, if the facts essential thereto can be found expressly stated or alleged by reasonable inference, looking at the language in its full reasonable scope.

In view of the foregoing it seems plain that it would be a waste of time to follow the analysis of the complaint made by the learned counsel for appellants to see whether the pleading will reasonably permit of the construction they contend

for. All might be conceded that is claimed in that regard, and it might be conceded, too, that so viewing the pleading it is fatally defective, without necessarily arriving at a right determination of the controversy now presented, since, as we have seen, the only legitimate test to be applied to the complaint is, Will it reasonably permit of a construction sustaining it? In view of all the facts alleged expressly or by reasonable inference, is the pleading bad as claimed? If it will satisfy such test it is good on demurrer, as indicated, however plainly it may be open to a motion for indefiniteness and uncertainty.

The main contention of appellants' counsel is that the complaint is bad because of misjoinder of causes of action. That involves a concession that there are two or more good causes of action stated (*Bassett v. Warner,* 23 Wis. 673; *Koepke v. Winterfield,* 116 Wis. 44, 92 N. W. 437), but that they are not such as can be united under sec. 2647, Stats. 1898. For the purposes of the discussion it may be taken for granted that the pleading does state several causes of action, that one is equitable to enforce a vendor's lien, while the others are legal. They are, nevertheless, properly joined if they "arise out of the same transaction or transactions connected with the same subject of action," affect all of the parties to the action, and do not require different places of trial. Sec. 2647, Stats. 1898. There can be and is no controversy but that all of the causes of action, if there be more than one, are triable at the same place. Therefore, we may confine our investigation to whether they arise out of the same "transaction or transactions connected with the same subject of action" and affect all the parties.

It would be very helpful in arriving at a correct conclusion if the learned counsel for appellants had given earnest attention to the meaning of the term "transaction" in sec. 2647 of the Statutes. The reluctance of courts to grapple with doubtful matters, or matters supposed to be doubtful, even when

so presented as to afford a perfectly legitimate opportunity for solving the same and blazing out a plain pathway for the bar and trial bench to follow, in the absence of necessity for action in that regard, is by no circumstance better illustrated than the one that, though the term mentioned has been significantly in use in Codes for nearly sixty years, it has not been judicially construed with such a degree of definiteness as to furnish any plain rule to go by. In *New York & N. H. R. Co. v. Schuyler,* 17 N. Y. 592, COMSTOCK, J., after a careful consideration of the matter, confessed inability to suggest a construction of the term filling all situations, independently of the discretion of the trial judge as to what under the circumstances in hand will best promote the ends of justice. He remarked:

"Its language is, I think, well chosen for the purpose intended, because it is so obscure and so general as to justify the interpretations which shall be found most convenient and best calculated to promote the ends of justice. It is certainly impossible to extract from a provision so loose and yet so comprehensive any rules less liberal than those which have long prevailed in courts of equity."

In *Keep v. Kaufman,* 56 N. Y. 332, another learned justice confessing the same situation said, apparently in a spirit of lamentation, "There are few rules of pleading in force." No material improvement upon the futile effort of Justice COMSTOCK to construe the statute can be found in the New York decisions. Very little light is thrown on the subject, other than by the application of the statute to the facts of particular cases. In no one that we can discover has any attempt been made to lay down a comprehensive rule. Without one it is not strange that there are many seeming inconsistencies in decisions, nor strange that in New York in the statute relating to the joinder of actions the word "transaction" has not been applied consistently with the same word in the statute on the subject of counterclaims.

The text-writers all note the failure of courts to meet

squarely and solve the situation above indicated. In 1 Ency. Pl. & Pr. 185, it is said, "No satisfactory definition has been given to the term 'transaction.'" In Bliss, Code Pleading, with considerable hesitancy, a construction of the statute is suggested, the author saying, "Its full and exact scope does not seem to have been judicially considered." § 126. In Maxwell, Code Pleading, at page 343, the author says, "No definition of the word 'transaction' has been attempted by any court as far as I am aware." In Baylies, Code Pl. & Pr. (2d ed.) at page 157, the author said:

"The language of this provision is very general and very indefinite. The judges have taxed their ingenuity to invent a rule for determining what the 'same transaction' means."

He indicates very clearly a conclusion that all such efforts have been well-nigh fruitless, referring significantly to this expression of CHURCH, C. J., in *Wiles v. Suydam*, 64 N. Y. 173, 177:

"This language is very general and very indefinite. I have examined the various authorities upon this clause, and I am satisfied that it is impracticable to lay down a general rule which will serve as an accurate guide for future cases. It is safer for courts to pass upon the question as each case is presented."

In Pomeroy, Code Rem. (4th ed.) §§ 357–370 (*463–*476), the author appears to have made a more earnest, and perhaps a more successful, effort than had been theretofore or has since been made to lay down some definite rule,—freely confessing, however, the difficulty in the way by reason of the dearth of satisfactory authority, and deploring the judicial habit of unwillingness to attempt the discussion and settlement of definitions, principles, and doctrines connected with the reformed procedure in a general and comprehensive form, which has resulted in leaving such difficulty so long unsolved.

We cannot expect to do fully what all the text-writers and jurists have avoided doing since 1852, when the term

"causes of action arising out of the same transaction or transactions connected with the same subject of action," was coined and made a part of Code systems of jurisprudence. This is an occasion, in the judgment of the writer, when that valuable service to the bench and bar might be legitimately performed. If it had now been, or at any time in the future should be, determined to remove, so far as possible, uncertainty respecting the matter, the writer would not hesitate to take up the work of speaking for the court to that end, though the difficulty to be overcome, in view of the general attitude on the subject, as before indicated, it is believed is fully appreciated. So far as opportunities are afforded therefor the law should be made as plain as judicial labor can reasonably make it. Especially in matters of practice it is better that uncertainties in ambiguous legislation should be removed by definite judicial determinations in the form or effect of plain rules, even if the precise thought of the statute makers is not thereby made effective, than that trial courts and the profession should be left to be guided by mere precedents of the application of the statute to particular circumstances.

Some general observations as to the meaning of the word "transaction" in the statute under consideration will suffice for this case. Prof. Pomeroy initiated his treatment of the subject, at sec. 357, with the statement "the words of the statute are broad, comprehensive, vague, and uncertain," but believing, as he said, that to leave the matter where Justice COMSTOCK did in *New York & N. H. R. Co. v. Schuyler*, *supra,* though the easiest way for the courts, so far fails to render efficient what the legislature intended as to be unjust to suitors and the profession, he proceeded to lend the aid of his learning in the matter. His reasoning is logical and his conclusions have met with much favor, though they have not, so far as we are aware, been adopted as judicial rules. We

approve thereof, generally speaking, and what we say is in harmony therewith.

The statute plainly suggests that out of one circumstance in its entirety involving two or more persons, denominated a transaction, there may result two or more remediable primary rights. It follows necessarily that the legislative idea is that in such primary or major circumstance the minor circumstances, the several rights, meet. At the point of union we have the transaction of the statute. However numerous may be the minor transactions, each constituting a primary right enforcible by the proper remedy, so long as they all reach back to the point of union as the parent cause thereof,—the connection between such point of unity and the various results enforcible as separate grounds for complaint being sufficiently close that the former can clearly be seen to be the proximate cause, so to speak, of the latter,—they all grow or arise out of one transaction, within the meaning of the statute, and may be vindicated together, each by its proper remedy, subject to the proviso at the close of sec. 2647.

A good illustration of the foregoing is found in the recent decision of this court in *Gutzman v. Clancy,* 114 Wis. 589, 90 N. W. 1081. There it was held that in case of a mutual assault the remedial rights of each of the combatants against the other arise out of a single transaction, within the meaning of the statute, and can be vindicated in the same suit, the defendant counterclaiming against the plaintiff's cause of action. Among the earlier cases is *Adams v. Bissell,* 28 Barb. 382. Prof. Pomeroy dignifies it by quoting the opinion of Justice SUTHERLAND in full. The defendants, as common carriers, contracted to transport to the city of New York and deliver to plaintiffs, as consignees, a quantity of wheat. The latter, as owners of the bill of lading, made advances on the grain. When the delivery was made there was a shortage of 340 bushels. Not knowing thereof before paying the freight, the consignees overpaid in that regard to the amount of $170.

They sued the carrier, joining in the complaint a cause of action for converting the 340 bushels of wheat and a cause of action to recover the $170 overpaid. The court held that the joinder was proper because the contract for the transportation was the transaction out of which the two rights of action arose. The discussion by the learned justice who wrote the opinion, of the clause "transactions connected with the same subject of action," wherein he referred to it as mere surplusage, seems rightly characterized by Prof. Pomeroy as unsound. *Jones v. Steamship Cortes,* 17 Cal. 487, is another illustrative case commonly referred to by text-writers. Plaintiff, through the fault of the owners of the steamship Cortes, was induced to purchase a ticket for passage for San Juan, supposing that the ship would land at that place, but it did not and she was carried to Panama, whereby she was subjected to pecuniary loss and to personal discomfort and injuries. It was held that all remedial rights arising in plaintiff's favor grew out of the transaction whereby she was induced to purchase a ticket for passage on the ship, and that the various causes of action were joinable.

Any number of other illustrations might be given. No considerable aid can be obtained by a further citation of precedents. It is the common opinion of writers that an extended discussion of them rather tends to confuse than enlighten. It is believed that the difficulty, referred to so many times in the books, of understanding the real thought intended to be expressed by the Code makers lies largely in the indisposition of judges to take kindly to the Code system of pleading, rather than to any real ambiguity in the words used. A cause of action consists of those facts as to two or more persons entitling at least some one of them to a judicial remedy of some sort against the other, or others, for the redress or prevention of a wrong. It is essential to the existence of such facts that there should be a right to be violated and a violation thereof. Since those two elements constitute a cause of

action, and to satisfy the statute they must arise out of one or more circumstances called a transaction, the latter is to be viewed as something distinct from the cause of action itself, else the latter could not arise out of the former. The occurrence of the transaction and of the facts constituting the cause of action may be simultaneous or not. A. enters into a contract with B. Out of that circumstance grows the right of each against the other to the performance of the contract. That right is the first essential or step to the creation of a cause of action. It necessarily must precede the existence of such cause. Subsequently that right is violated. In that we have the final essential or step to the creation of the cause of action. There may be several such rights and several such violations, hence, necessarily, several such causes of action, produced each by minor circumstances, each set thereof reaching back to the major transaction in which they unite and from which they arise in the regular course of events. Going back from one completed cause of action to the point of unity and thence to another such cause we discover the proximate relation between them. The cause or circumstance upon which all depend is the transaction of the statute. All the causes of action, within the meaning of the statute, arise out of that. The major transaction may occur long prior to the violation of the right constituting the last step completing any one of the various causes of action. It is easily comprehended that in one circumstance in its entirety there may exist two or more rights and that there may be distinct invasions thereof, each invasion of itself constituting a separate wrong redressible by the remedy appropriate thereto.

Giving to the words of the statute their plain ordinary meaning in view of the situation with which the builders of the new system had to deal, the meaning thereof does not seem to be very obscure. If it were not for its having been repeatedly characterized as ambiguous in a high degree we should feel warranted in saying that its meaning is plain.

Any event in which two or more persons are actors, involving a right which may presently or by what may proximately occur in respect thereto be violated, creating a redressible wrong, is a transaction within the meaning of the statute. All such wrongs which, in the regular course of events, through the rights violated, have such proximate relation to that transaction that it can be legitimately said they arise out of it are redressible in one action, regardless of the form of the remedy required as to each, subject to the proviso of the statute before referred to.

The foregoing analysis of the statute goes far enough for the purposes of this case. We do not need to consider the meaning of the term "transactions connected with the same subject of action," though in passing we may say again that it is not mere surplusage, as suggested in *Adams v. Bissell,* 28 Barb. 382. It covers a different situation than that referred to by the term "causes arising out of the same transaction." Manifestly, there may be such cause and others arising out of transactions connected with the subject thereof, yet the latter not arise out of the transaction first spoken of nor out of such subject. Doubtless, as has been said by text-writers and judges, the second clause of the statute applies more generally, if not exclusively, to equitable suits.

In view of the foregoing, unless we can discover in the complaint the existence of some primary transaction creating directly or proximately the several distinct rights alleged to have been violated, the demurrer for misjoinder should have been sustained.

At the outset it is alleged that February 8, 1901, "plaintiffs *John W. Emerson* and *David W. Emerson* entered into an agreement in writing with *Thomas E. Nash* and *Guy Nash,*" in which the former obligated themselves in several distinct particulars to the latter, who in consideration therefor obligated themselves as to each such particular to the former. Manifestly, the mutual obligations as to each such matter cre-

ated corresponding rights to performance, and failure by either party, upon that being due to the other, constituted a remediable wrong and a cause of action arising out of the transaction creating the right itself, to wit, the contract of February 8, 1901. Each such right formed a step toward a possible cause of action, which required only an invasion of it to complete the same.

It is further alleged that September 26, 1901, for the purpose, among other things, of enlarging the scope and amending the terms of said original contract, "plaintiffs *John W. Emerson* and *David W. Emerson,* on the one side, and the defendants *Thomas E. Nash, Guy Nash, James B. Nash,* and *William F. Vilas,* on the other side, made and entered into certain written articles of agreement under their hands and seals, hereinafter designated as 'articles of agreement,' and that except as amended and modified by said articles of agreement, the said original contract remained in full force and effect, and that thereafter the said original contract and articles of agreement constituted and were treated by the plaintiffs and defendants as one contract." There seems to be a pretty plain statement that the second agreement was but a mere modification and enlargement of the first, whereby all of the parties became mutually obligated as to all particulars of the entire agreement. Excluding from consideration the concluding words of that part of the paragraph commencing with "and that except as amended," etc., still we have a fairly plain statement that the first contract was merely extended and changed by the second transaction, leaving but one entire agreement in which plaintiffs stood for all the obligations on one side and defendants jointly stood for all those on the other. Note the significance of the expression in that regard, "*John W. Emerson* and *David W. Emerson, on the one side,* and the defendants *Thomas E. Nash, Guy Nash, James B. Nash,* and *William F. Vilas, on the other side,* made and entered into," etc. It needed no additional language to show that those parts of

the first agreement not inconsistent with the supplement thereto were preserved as parts of one agreement, which included the amendatory part of the contract of September 26, 1901. The language to the effect that the first transaction and the second constituted one contract and were by all parties so treated ever after the occurrence of the latter, really does not add anything to what preceded it, other than an indication of what the pleader intended theretofore to state. Perhaps in that regard it strengthens such language. However, it seems without any such reinforcement, by reasonable inference at least, the language of the pleader shows he intended to and did state that by the occurrence of September 26th, that of February 8, 1901, was amended and broadened so that the plaintiffs obligated themselves as parties on one side of the amended agreement, and all of the defendants obligated themselves as parties on the other as to all matters involved. The language used is too comprehensive, as it seems, to permit us to hold that it neither states expressly nor by reasonable inference that the two transactions were merged into one, with mutual obligations as to all particulars affecting all the parties, unless there is something later in the pleading so inconsistent therewith as to change that appearance.

The result up to this point indicates that all rights created in plaintiffs' favor by the entire contract,—the amended agreement of September 26, 1901, embracing all the matters material to this case included in the transaction of February 8, 1901,—relate to one transaction, and the violations of such rights, alleged, created separate causes of action legitimately arising therefrom, within the meaning of the statute.

The point is made that the option mentioned in the first clause of the complaint was accepted by *Thomas E. Nash* and *Guy Nash* prior to the occurrence of September 26, 1901, and that thereby that part of the original contract became a completed independent agreement, creating a new primary right, itself a subject of a cause of action contingent upon a

violation thereof, and which could not arise out of the transaction of later date, to wit, that of September 26, 1901. In this it seems that counsel make the mistake of supposing that the vindication of the right under the completed feature of the original contract is not enforcible in company with others created by such contract, because it is primary in the sense that it with a violation thereof constitutes a complete cause of action. That use of such term should not be mistaken for the use when applied to the dominant right in a bill in equity, which may draw a multitude of other matters, each sufficient to form a cause of action, so closely to it that the whole is said to constitute a single cause of action. *Zinc C. Co. v. First Nat. Bank,* 103 Wis. 139, 79 N. W. 229; *South Bend C. P. Co. v. Geo. C. Cribb Co.* 105 Wis. 443, 81 N. W. 675; *Gager v. Marsden,* 101 Wis. 598, 77 N. W. 922. It is no objection to the joinder of causes of action that they concern separate primary rights,—none whatever. If that were not so there could be no such thing as the joining of several causes of action in one suit, since each such cause must necessarily involve in a sense a single such right. If all such causes arise out of the same transaction, or transactions connected with the same subject of action, that is sufficient.

While it is true it is alleged that *Thomas E. Nash* and *Guy Nash,* prior to September 26, 1901, bound themselves absolutely to plaintiffs to purchase and pay for part of the land mentioned in the original contract, the subcontract grew out of the original transaction and was executory at the time of the occurrence of September 26, 1901. It created a primary right in the sense that it made what was theretofore optional on one side, absolute so that the invasion of it constituted a cause of action, but not in the sense that it was so disconnected with the parent contract that a cause of action to enforce it could not be reasonably said to arise out of the latter as embodied in the transaction of September 26, 1901. It is considered that since before the subcontract was violated it be-

came subsidiary to the amended contract, which contained mutual obligations binding on all parties on one side to all the parties on the other as to the whole matter, the completed cause of action to vindicate it arose out of the relations existing between all the parties under such amended contract.

It may be that one might reasonably construe the pleading so as to render the so-called completed contract so disconnected with the transaction of September 26th that the cause of action to enforce it could not well be said to arise out of the latter transaction. True, the allegation that "*Thomas E. Nash* and *Guy Nash* duly sold, transferred, and assigned to *James B. Nash* and *William F. Vilas* an undivided one-half interest in said completed contract of purchase, *so that the same* then subsisted between the plaintiffs *John W. Emerson* and *David W. Emerson* on the one side and the defendants *Thomas E. Nash, Guy Nash, James B. Nash,* and *William F. Vilas* on the other side," might be true in the sense that the executory vendees thereby became jointly entitled to enforce the contract against the executory vendors, upon putting the latter in default,—and such vendors be not entitled to enforce the contract against such vendees. If there were a mere assignment of a one-half interest in the completed contract, no mutual obligations were created in respect to the matter as to all the parties. But it was perfectly competent for the assignors and assignees to make their transaction in such form as to put the latter in the same position as to the executory vendors as the assignors. That was the most natural thing to do under the circumstances. It is considered that the allegation of the complaint in regard to the assignment, in connection with what immediately follows as to the change in the original contract, fairly states that as what the parties did do. It is significant that the assignment and the enlargement of the general contract occurred at the same time, apparently as parts of one transaction, and that the allegation as to the nature of the former is in harmony with that as to

how the parties dealt in respect to the latter. It is alleged that plaintiffs as one party contracted with all the defendants as the other party, suggesting the creation of mutual obligations affecting all. It should be further noted that the allegation as to the assignment does not state that *Thomas E. Nash* and *Guy Nash* assigned an undivided one-half interest in the contract to *James B. Nash* and *William F. Vilas,* and that all thereby became contractors on one side with the plaintiffs on the other, but the statement is that the assignment was *made "so that the same subsisted between the plaintiffs,"* or in other words became a contract between the plaintiffs "on one side" and all the defendants "on the other side." It was competent to thus plead the facts according to their legal effect, and we must incline to the view that they were so pleaded, since that is reasonable, rather than adopt another view which is unfavorable to the pleader. The view we take of the allegations as to the transaction of September 26, 1901, puts all the defendants in the same relation to the plaintiffs and renders the invasion of every distinct separable right created thereby the final step in a cause of action arising proximately, at least, out of one transaction commenced February 8, 1901, and completed September 26, 1901.

What has been said leads logically to a disproval of the contention that the causes of action, so called, stated in paragraphs 42 to 47, inclusive, of the complaint, each being for compensation for services performed under the terms of the contract as made February 8, 1901, embraced, as we have seen, in that of September 26, 1901, cannot be joined with the same cause of action already discussed. All arise in the statutory sense out of one transaction. In discussing this branch of the case the learned counsel for appellants appear to confuse the term "primary right" with the term "transaction." They say, "It is respectfully submitted that there is no sort of chance to contend that the first cause of action arises from the same primary right which is asserted as a basis for

the other six." If what one would ordinarily understand by that is what counsel mean, they are in error. Causes of action are not joinable because they arise out of the same primary right, but because they arise out of the same transaction.

What has been said renders it unnecessary to discuss the question of whether all of the causes of action affect all the parties to the action. The affirmative of that proposition is the logical effect of what has already been said.

It is contended that the second cause of action, so called, the one stated in subdivision 42 of the complaint, is not sustainable because it is nowhere alleged that all the defendants became parties to the agreement to pay commissions upon the purchase price of the lands therein mentioned. From the conclusion we have reached that the original contract to pay plaintiffs commissions became incorporated into the agreement of September 26, 1901, with mutual obligations as to all the matters referred to in the beginning, and thereafter as well, it follows that we must regard the facts, which appellants' counsel insist are not pleaded, as fairly stated.

What has been said sufficiently disposes of the objection to the causes of action, so called, stated in paragraphs 44 and 45.

We are unable to appreciate the criticism of the cause of action, so called, stated in paragraph 43 of the complaint. It is said that "aiding plaintiffs in obtaining title to lands owned by Ashland county was not within the scope of the first contract." That suggestion, so far as it is based on the circumstance that such contract was originally with but two of the defendants, has been sufficiently met. It is said that county lands were open to any purchaser; that an option to purchase such lands with the privilege of examination, such as respondents agreed to obtain, was not procured, and would not have been legal had it been secured, and that it is not alleged that any such was obtained. The lands mentioned were such as the county had acquired title to with the right to sell the same for cash in the discretion of its governing board. It had the

power to proceed in that regard according to the ordinary method of doing such business. It is alleged, in effect, that respondents performed services for defendants, under the contract relating to such matters, in procuring for appellants the opportunity to purchase lands from Ashland county, which were within the territory mentioned in such contract. That was as well within the terms of such contract as services rendered to a like end regarding lands owned by any other party. It is further alleged that respondents pursuant to the terms of the contract arranged for the purchase of the land if the defendants should so elect, and the latter pursuant to such arrangement, and not otherwise, elected to and did purchase the land. If plaintiffs so arranged, they obtained an option within the meaning of the contract, and if subsequently appellants elected to and did purchase the land, they obtained the same pursuant to the option. The contract did not require an option to be obtained in any particular form nor to run any specific period of time. True, according to the terms of the contract commissions were agreed to be paid to respondents only on the purchase price of lands optioned in their own names in appellants' interest, which the latter, after a proper inspection, elected to purchase, and the agreement necessarily contemplated that the options would provide for time for such inspection. But if in any case an option was obtained in a good-faith execution of the contract and appellants elected to take under it, they could not successfully resist the demand for the commission because time for a proper examination of the property was not afforded them.

It is contended that the cause of action, so called, stated in subdivision 47 of the complaint cannot be said to arise out of the same transaction as the others, because the contract did not call for any such services as are there spoken of. We take it that counsel so contend because, whereas under the contract commissions were agreed to be paid plaintiffs upon the purchase price of lands taken under options obtained by them

in their own names for the use of the defendants, it is not alleged that the lands in question were so optioned. The idea seems to be that, though respondents proceeded in good faith under the contract to obtain options for appellants and expended considerable sums of money in that regard and devoted considerable time thereto and to put appellants in possession of the necessary information to enable them to decide whether to purchase the land or not,—no commission was earned because the purchase was made without a preliminary binding option as contemplated. We cannot agree with that. If, as alleged, respondents negotiated with the owners of the land for the purpose of obtaining an option to enable appellants to purchase the same, and as a result of their time and money devoted to the performance of their obligations appellants accepted the land, they became liable for the commission stipulated for in the contract, regardless of whether there was a formal option and an election to take under it or not. The bringing of the parties together, obtaining for appellants the opportunity to make the purchase, aiding them to that end till they were satisfied to take the land, and their doing so substantially satisfied every requirement of the contract not waived by appellants.

There is nothing further that need be said. The general result is that all of the so-called causes of action, including the one for a vendor's lien, affect all of the defendants, and arise out of one transaction embodying the agreement of February 8th, and the addition thereto and change thereof of September 26, 1901, and hence are joinable.

The complaint is by no means a model of conciseness and clearness. There are ambiguities which might well challenge the attention of the careful practitioner. If it were proper to measure the allegations of the pleading with a critical eye, only seeing those facts alleged which are clearly and expressly stated, it probably could not be sustained. It may be, and possibly is, open to objection for indefiniteness and un-

certainty at several points, but that is not the question here. Viewing it in the light of the liberal rules that must be applied thereto, it seems that the facts essential to sustain it are alleged expressly or by reasonable inference. Other inferences could probably be drawn from the pleading which would defeat it, but the favorable inference should prevail. Many of the facts necessary to sustain the pleading, which we hold are stated by reasonable inference, may not exist at all. For the purpose of sustaining it we must assume, under the circumstances, that they do exist.

By the Court.—The orders appealed from are affirmed.

WINSLOW, J., dissents.

PIER, Respondent, vs. ONEIDA COUNTY and others, Respondents: DOOLITTLE, Appellant.

February 21—March 14, 1905.

Judgment: Vacating: Right of a person not a party.

After judgment establishing the mutual rights of the parties in an action against a county to annul tax certificates on plaintiff's lands, the owner of a portion of such certificates, not being a party to the action nor seeking to be made a party nor showing that the county is a mere nominal party and he the real party in interest, has no right to have the judgment vacated on his motion.

APPEAL from an order of the circuit court for Oneida county: W. C. SILVERTHORN, Circuit Judge. *Affirmed.*

This action was brought in March, 1903, against *Oneida* county, its treasurer and clerk, to set aside the assessment of taxes for 1901 upon certain lands in the county owned by the plaintiff, and to annul the tax certificates issued for delin-

quent taxes thereon. Judgment without costs to either party was entered on March 16, 1903, upon the facts as stipulated by the parties. By this judgment the tax certificates issued by the county on account of such delinquent taxes were annulled, that portion of the tax found to be equitably due the county as a proper tax upon the lands was ordered paid by the plaintiff, and the county clerk and his successors in office were restrained from issuing tax deeds upon the outstanding certificates based upon the unpaid taxes originally assessed.

On the 27th of the succeeding November, appellant, who is not a party to this action, made application to the court and showed that he was the owner of a portion of the certificates against the lands of plaintiff covered by the judgment, and which had been issued by *Oneida* county at the sale for delinquent taxes in May, 1903. He moved the court to vacate the judgment. After a hearing on this motion the court refused to make such an order, and this is an appeal from the action of the court denying the application.

For the appellant the cause was submitted on a brief by *L. A. Doolittle.*

For the respondents there was a brief signed by *John Barnes,* of counsel, for the plaintiff, and *Sam S. Miller,* district attorney of *Oneida* county; and the cause was argued orally by *Mr. Barnes.*

SIEBECKER, J. Appellant is not a party to this action, nor does he now seek to be made a party. He applied to the court to have the judgment vacated upon the ground that, as owner of tax certificates issued by the county for delinquent taxes on the lands involved, his interests therein are adversely affected by the judgment. Under the facts stated he is a stranger to the action. It is well settled that a stranger to an action has no right to disturb a judgment by a motion to vacate it without first having obtained the status of a party, unless it appears that the party of record is merely a nominal party and

the party so moving the court is the real party in interest. Under such circumstances he may be treated as having the standing of a party to the action and as having control of the same. *Ætna Ins. Co. v. Aldrich,* 38 Wis. 107.

It, however, does not appear but that the county is the real party in interest in this case, nor does it appear that appellant's legal rights as certificate holder have been determined, nor could they be in the absence of his being made a party to the action. If appellant were allowed to interpose and assume the control of the action after judgment under these circumstances, it would result in an invasion of the rights of the parties who have prosecuted the cause to a final judgment which establishes their mutual rights in this controversy. Appellant's application to vacate this judgment is not well founded in the law and was properly denied by the trial court. The following authorities in this court sustain this ruling: *Ward v. Clark,* 6 Wis. 509; *Packard v. Smith,* 9 Wis. 184; *Ætna Ins. Co. v. Aldrich,* 38 Wis. 107.

By the Court.—The order appealed from is affirmed.

COLLIER, Respondent, vs. TOWN OF SCOTT, Appellant.

February 21—March 14, 1905.

Public health: Powers of health officer: Employment of physician: When town liable.

1. Under sec. 1412, Stats. 1898, a health officer has no power, without the approval of the board of health, to take measures for the prevention, suppression, and control of a contagious disease. He cannot, without such approval, bind the town by the employment of a physician to attend a person afflicted with such a disease.
2. Sec. 1416, Stats. 1898, relates to the duties of the board of health; and the health officer cannot exercise the powers there conferred, without the approval of the board.

[3. Whether the board of health has any power to charge the town with the expense of medical services and medicine furnished to a person infected with smallpox, especially when such person is not a pauper, but able to pay such expense, not determined.]

APPEAL from a judgment of the circuit court for Lincoln county: W. C. SILVERTHORN, Circuit Judge. *Reversed.*

This is an action to recover, for physician's services and for drugs furnished, $101.30. Plaintiff is a physician, and defendant one of the towns of Lincoln county, Wisconsin. On April 10, 1901, the board of supervisors of said town met to organize as a board of health, and elected one A. W. Schulz chairman, one Fred Kleinschmidt clerk, and one William Hackbarth as health officer. In November one John Hintz, a well-to-do farmer residing in the town, and his family, became afflicted with smallpox. When first afflicted Dr. Walsh was employed by Hintz. Soon thereafter Dr. Walsh wrote to one Kluch, a resident of the town but not a member of the board of health or of the town board, of the trouble with the Hintz family, suggesting that they be quarantined. The letter was placed in the hands of Schulz, chairman, who promptly exhibited it to Hackbarth with the explanation that the letter showed there ought to be a sign put on the Hintz house, and to attend to it and put the sign on, if necessary. The next day Hackbarth called at the Hintz home and after talking with Hintz, through his daughter, went to the city of Merrill and had some talk with plaintiff about attending to the patients. What was said at that time between plaintiff and Hackbarth is in dispute, but, pursuant thereto, plaintiff at once visited the family and found them quarantined, and on his return sent them medicine by Hackbarth. Plaintiff continued to visit and treat the family until their recovery, and made eight calls for which he charged $80, and furnished medicine for which he charged $21.30. Hackbarth never reported to, nor received any instructions from, the board of health, and the board never approved his employment of

plaintiff. Plaintiff's claim was presented to the town board of audit, brought up at the annual meeting, but not allowed.

The action was tried in the county court, where judgment was rendered for defendant. Plaintiff appealed to the circuit court, the action was tried by the court, and the court found for the plaintiff and directed that judgment be entered against defendant for full amount of plaintiff's claim, with interest and costs, from which judgment this appeal was taken.

The cause was submitted for the appellant on briefs by *John Van Hecke,* and for the respondent on the brief of *Flett & Porter.*

To the point that sec. 1416, Stats. 1898, in providing that what is done shall be at the expense of the individual, does not intend to exempt the public from immediate liability, counsel for respondent cited *Rae v. Flint,* 51 Mich. 526, 16 N. W. 887; *Elliott v. Kalkaska Sup'rs,* 58 Mich. 452, 25 N. W. 461; *Wilkinson v. Long Rapids,* 74 Mich. 63, 41 N. W. 861; *Safford v. Detroit Board of Health,* 110 Mich. 81, 67 N. W. 1094.

KERWIN, J. The liability of towns for expenses incurred in the investigation, prevention, suppression, and control of dangerous contagious diseases is regulated by statute. Sec. 1411, Stats. 1898, provides for the organization of a board of health. Sec. 1412, Stats. 1898, provides that:

"It shall be the duty of every health officer, chosen under the provisions of the preceding section or under any village or city charter, upon the appearance of any dangerous contagious disease in the territory within the jurisdiction of the board of which he is a member, to immediately investigate all the circumstances attendant upon the appearance of such disease, make a full report to such board and also to the state board of health; and it shall likewise be his duty at all times promptly to take such measures for the prevention, suppression and control of any such disease as may in his judgment be needful and proper, subject to the approval of the board of which he is a member."

Under this statute the power conferred upon the health officer is to "investigate all the circumstances attendant upon the appearance of such disease, make a full report to such board and also to the state board of health." No authority is vested in the health officer to take measures for the prevention, suppression, and control of disease except subject to the approval of the board of health, and it is clear that the power to investigate and report does not embrace the power to take measures for the suppression and control of disease, vested in the board of health as a board. The statute does not appear to give the health officer any discretionary power concerning the prevention, suppression, and control of the disease, but simply imposes upon him the duty of investigating the circumstances attendant upon the appearance of the disease and making report. Whether the health officer could in any case bind the town by the employment of a physician to aid him in such investigation it is not necessary here to decide, because it appears that the plaintiff was not employed for any such purpose nor was it necessary that he should be. The afflicted family already had the services of a physician, the case had been declared smallpox, and the premises quarantined before the employment of plaintiff. The court below found as a fact that, before plaintiff was called, the health officer went to the home of Hintz, and was informed by a member of the family that they already had a doctor and wanted none other, and the premises had been quarantined and the case declared smallpox. Moreover, the cause of action set out in the plaintiff's complaint is for medical services and medicines furnished in the treatment and attendance upon John Hintz and family. The plaintiff testified that the health officer informed him that the family had had smallpox several days and were under quarantine and that he wanted him to take care of the case and furnish everything necessary. It is clear, therefore, that there is no claim in this action for services rendered by plaintiff in investigation and report, even if the

health officer had authority to employ plaintiff for such purpose. The board is authorized to take such measures as may be deemed necessary for the prevention, suppression, and control of the disease, and this involves the exercise of discretion, which the statute wisely vests in the board, and which was not intended to be given to the health officer, for obvious reasons. It is undisputed that the action of the health officer in the employment of plaintiff was never authorized or approved by the board of health as a board, or even by its members individually, and the question, therefore, is whether the health officer had power to employ plaintiff to treat the Hintz family and furnish them with medicine. We think it very clear that he had not. The power to charge defendant with the expenses of a physician in the prevention, suppression, and control of a dangerous and contagious disease, if it exists in any case, is vested in the board of health, and not in the health officer without the approval of the board, and the plaintiff was bound to know at his peril that the action of the health officer in that regard was subject to the approval of the board, and, such approval not having been given in any manner, plaintiff makes no case against defendant.

Counsel for respondent contends that the failure to secure the approval of the board of health does not relieve the town from liability, where the health officer takes such measures as in his judgment are necessary to prevent the spread of disease. We do not so understand the statute. The power to investigate and report is given to the health officer without limitation, but the power to take measures for the prevention, suppression, and control of the disease is vested in the board, and cannot be exercised by the health officer without approval of the board. Whether this legislation is wise or otherwise, and whether more extensive powers should be given to health officers, are not questions for the courts. The legislature, doubtless, in limiting the powers of the health officer and making them subject to the approval of the board, clearly intended

that such matters involving the exercise of judgment and discretion should be vested in the board and not in the health officer, and that the acts of the health officer in such matters should not be binding without the approval of the board. This seems to be the plain and obvious intention of the legislature and cannot be disregarded. *Barrett v. Hill Co.* (Tex. Civ. App.) 74 S. W. 811.

Counsel for respondent refers to the duty of the health officer under sec. 1416, Stats. 1898, but this section relates to the duties of the board of health and not the health officer, and it is very clear from the statute itself, as well as upon principle and authority, that the health officer could not exercise the duties imposed upon the board of health under sec. 1416, Stats. 1898, without the approval of the board. *Doyle v. Gill,* 59 Wis. 518, 18 N. W. 517; *McNolty v. School Directors,* 102 Wis. 261, 78 N. W. 439; *Young v. Blackhawk Co.* 66 Iowa, 460, 23 N. W. 923; *McIntire v. Pembroke,* 53 N. H. 462. Sec. 1416, Stats. 1898, provides that the charge shall be against the person so taken care of, or against any other person who may be liable for his support, and makes no exception. It is at least very doubtful whether the board of health has any power under the statutes of this state to charge a town with the expenses of medical services and medicine furnished to a person infected with smallpox, especially when such person is not a pauper, but well-to-do and amply able to pay for such services and medicine. Secs. 1416, 1421, Stats. 1898; *Kollock v. Stevens Point,* 37 Wis. 348; *Marshall Co. v. Roseau Co.* (Minn.) 101 N. W. 164; *Dodge Co. v. Diers* (Neb.) 95 N. W. 602; *Walker v. Boone Co.* (Iowa) 97 N. W. 1077; *McIntire v. Pembroke, supra; Gill v. Appanoose Co.* 68 Iowa, 20, 25 N. W. 908.

But the question here is not whether the appellant would be liable in case the employment was by authority or approval of the board of health, and we refrain from expressing any opinion as to the liability of the defendant if the employment

had been approved by the board. We hold that the health officer, without the approval of the board, had no authority to employ plaintiff on behalf of the town, or render it liable for the plaintiff's claim, and, therefore, that the judgment of the court below should be reversed.

By the Court.—Judgment reversed, and cause remanded with instructions to the court below to enter judgment dismissing plaintiff's complaint.

YESS, Appellant, vs. CHICAGO BRASS COMPANY, Respondent.

February 22—March 14, 1905.

Master and servant: Negligence: Personal injuries: Assumption of risk: Proximate cause: Hidden danger: Failure to instruct.

1. An employee in a mill must be deemed to have assumed the risk of injury by slipping on lubricating oil which had been allowed to accumulate upon the floor near the machine at which he was working, the presence of the oil and the danger therefrom being obvious.
2. It is not necessary that the proximate cause of an injury should be the immediate cause thereof, in order to warrant a recovery.
3. In the operation of a machine for winding into rolls thin bars or sheets of brass, the hands of the operator were expected to come in contact with it, but it could not be stopped while in use and under tension in case his hand got caught. An inexperienced employee, set to work at this machine, was not instructed as to this danger, but was told that he could stop the machine at any time by stepping on a certain lever. While operating the machine he slipped upon some lubricating oil on the floor, causing his hand to be caught in the machine, and, being unable to stop it by means of the lever, he was severely injured. *Held:*

   (1) The oil on the floor, though it may have been the originating cause of the injury, could not be said, as a matter of law, to be the "efficient cause" thereof.

   (2) The failure to notify the employee of the danger arising from the fact that the machine could not be stopped under such circumstances—that danger being a hidden one—was negligence on the part of the employer.

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Reversed.*

This is an action for personal injuries sustained by the plaintiff while in the employ of the defendant in operating a brass rolling block machine in the defendant's brass rolling mill, May 22, 1902. Issue being joined and trial had, the court, at the close of the testimony on the part of the plaintiff, granted a nonsuit, and from the judgment entered thereon the plaintiff appeals.

The evidence, as stated on the part of the plaintiff, tends to prove that the machine so operated by the plaintiff consists in the main part of a short shaft about four feet long, at the end of which is a cylindrical block, made of wood, about eighteen inches long and eight inches in diameter. The block is set behind the large rolls and about three or four feet from them, and is used in winding into rolls the thinner bars of brass as they pass through the large brass rolls. The shaft and block is made to revolve or turn by means of two large pulleys on the opposite end of the shaft from the wooden block, which are connected by belts to pulleys on the main shaft above. These two pulleys are about ten inches apart and revolve in opposite directions. They are not so connected with the shaft as to impart motion to it, except by a clutch, which slides back and forth upon the shaft between the pulleys and engages with either of them. This clutch is so moved by means of a foot lever connected therewith and extending under the block at the opposite end of the machine, where it may be easily touched by the foot of the operator. Thus, when the clutch is moved so as to engage with the outer pulley, in which position it is kept by means of a spring unless moved therefrom by means of such lever, the block revolves so as to wind or coil up the bars of brass as they come from the rolls; but if the clutch is disengaged from the outside pulley by means of such lever, the block ceases to turn unless the clutch be moved by such lever over to and engaged with the

other pulley, in which case the block will be caused to revolve in the opposite direction, loosening and unwinding the roll of brass. The friction of the clutch upon the pulley is upon a bearing of about three quarters of an inch; that is to say, the surfaces of contact between the clutch and the pulley, or the surface of the recess in the clutch and the corresponding surface on the pulley, are each about three quarters of an inch in area, and each surface is curved and kept well oiled, so that a very slight pressure upon the lever will disengage the clutch from the pulley and stop or reverse the block as the same is used in the conduct of the defendant's business.

In using this machine the employee takes hold of the bar of brass near the end, after it has come through the rolls, and, as it is slowly rolled out, carries it under the block, and with the hands bends the end of the bar around the block, pressing it tightly to the block, and causing the end of the bar to become caught between the bar and the block at the point of contact on the under side of the block, and the bar to be rolled up. When the bar has been entirely rolled or coiled up on the block he touches the lever with his foot, thus disengaging the clutch from the pulley and stopping the block and permitting him to remove the roll of brass from it. It takes considerable strength to bend and hold the bar tight about the block in order to get it caught. The block revolves and runs away from the operator very slowly, the bar of brass passing from the rolls to it about as fast as a man walks slowly. These pulleys on the block machine are flanged so that the belts cannot be removed therefrom. There is no belt shifter or any other means of disengaging power from this machine except the lever shifting the clutch as described; and when the machine is engaged in winding or coiling a bar of brass it is impossible to disengage the clutch from the pulley on account of the great tension of the bar of brass as it is being wound up. There is then no other way of stopping the block than by cutting the belt transmitting power to it.

The defendant employed the plaintiff and set him at work at this block machine five or six weeks before the accident. He was inexperienced with machinery, and particularly with this block machine, and knew nothing about its operations or its dangers. The plaintiff had not applied for such work, and the defendant directed one familiar with the operation of the machine to instruct him how to run it. The plaintiff was given no instruction as to such impossibility to stop the machine when in operation, but, on the contrary, was told that when he wanted to stop the machine all he had to do was to put his foot on the lever disengaging the clutch. The plaintiff believed from what he had been told that he could stop the machine instantly, at any time, by placing his foot upon the lever. He had no occasion to attempt to stop the machine while it was engaged in winding brass, and knew, moreover, that to stop the machine at such a time would cause serious trouble in his work. The defendant and its foreman knew that the machine could not be stopped when in use and under tension.

The plaintiff worked at this machine the greater part of the time for five or six weeks immediately before the accident. On the morning of that day, just as he was bending a bar about the block and holding it so that it would become caught and rolled up, his foot slipped on a small quantity of oil on the floor near the machine, causing his hand to slip between the bar and the block. He immediately pressed upon the lever with his foot, and then he jumped on it with both feet, and learned for the first time that it was powerless to stop the machine. Up to the time he had stepped upon the lever with both feet only his hand was caught, and that was not injured. But the machine could not be stopped until several minutes after, and then was stopped by cutting the belt with a pocket knife, after the plaintiff's arm had been slowly wound up, broken in several places and greatly mangled, and his body had been turned about the block three times and

seriously injured by striking against the machine. The plaintiff testified that he was not aware of this oil upon the floor on that day until after he was injured. It was lubricating oil which had been used, and undoubtedly came from the oil cup under the shaft hanger, which was above the place where the plaintiff worked, and which was permitted to overflow.

Norman L. Baker, for the appellant.

For the respondent there was a brief by *Peter Fisher,* attorney, and *Kearney, Thompson & Myers,* of counsel, and oral argument by *Mr. Fisher* and *T. M. Kearney.*

CASSODAY, C. J. It is alleged in the complaint that the defendant was negligent in failing to furnish the plaintiff with a reasonably safe place in which to work while operating the machine, by allowing oil to accumulate upon the floor; also that the defendant was negligent in setting the plaintiff at work upon a machine which could not be stopped when in use under tension, and failing to instruct him that it could not be stopped when so in use, and instructing him that it could be stopped by means of the lever mentioned in the foregoing statement of facts. In opening the case to the jury the plaintiff's counsel claimed that each of such two grounds of negligence was the proximate cause of the plaintiff's injury. Thereupon counsel for the defendant gave notice that they would object to any evidence tending to prove two different proximate causes of the injury, not concurrent, and demurred to the complaint *ore tenus* on that and other grounds. The court reserved its ruling.

Testimony was then given on the part of the plaintiff as indicated in the foregoing statement. Among other things it tended to prove that the machine could not be stopped, when under tension, except by breaking or cutting the bar that was being wound up or cutting the belt; that the plaintiff was not instructed as to that fact, and had no information in respect

to it until the accident in question; that he was told by the defendant's superintendent that the way to stop the machine was to put his foot on the lever. That was true when the machine was not under tension, but was not true when the machine was under tension, as indicated in the foregoing statement.

At the close of the direct examination of the plaintiff in his own behalf, the court, on motion of the defendant, struck out all testimony concerning the alleged failure of the defendant, its officers or agents, to inform the plaintiff as to the manner of operating the machine, for the reason that under the pleadings and the law, upon which the plaintiff must rely, the proximate cause of the plaintiff's injury was the presence of oil upon the floor upon which the plaintiff slipped at the time of the accident. Subsequently other testimony on the part of the plaintiff was excluded on the same ground. At the close of all the testimony on the part of the plaintiff his counsel asked to have stricken out of the record what appeared to be his statement at the opening of the trial respecting two proximate causes of the injury, for the reason that it did not contain all that he had said at the time, in that it failed to state that he relied principally upon the negligence of the defendant in furnishing an unsafe machine and failing to instruct the plaintiff of its dangers. Thereupon the court granted the defendant's motion for a nonsuit, based upon the pleadings as explained by the plaintiff's counsel at the time of opening the case to the jury.

1. That motion was manifestly granted on the ground that such presence of oil upon the floor was so obvious to any man of ordinary intelligence, during the five or six weeks the plaintiff had worked upon the machine, that he knew or ought to have known of its presence and the danger of slipping thereon; and hence that he must be deemed to have assumed the risk. *Stephenson v. Duncan,* 73 Wis. 404, 41 N. W. 337; *Peterson v. Sherry L. Co.* 90 Wis. 83, 62 N. W. 948; *Hazen*

v. West Superior L. Co. 91 Wis. 208, 64 N. W. 857; *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 73 N. W. 573; *Foss v. Bigelow,* 102 Wis. 418, 78 N. W. 570; *Sladky v. Marinette L. Co.* 107 Wis. 260, 261, 83 N. W. 514; *Koepcke v. Wis. B. & I. Co.* 116 Wis. 92, 92 N. W. 558. It follows that, however negligent the defendant may have been in allowing oil to accumulate upon the floor, it was no ground for recovery in this action. Nevertheless, it was one of the facts in the case tending to show the circumstances under which the plaintiff was required to operate the machine.

2. The important question in the case is whether it was error to exclude testimony tending to prove that the machine could not be stopped while in use and under tension, and that the defendant failed to inform the plaintiff of that fact, and that the instructions given were to the contrary. Such ruling is claimed to be justified by a recent decision of this court. *Pautz v. Plankinton P. Co.* 118 Wis. 47, 51, 94 N. W. 654. In that case the defective wooden wheel transmitted power to the defective iron wheel which broke; and it was held that the defective wooden wheel was the sole proximate cause of the injury—that it was the originating and efficient cause which set the defective iron wheel in motion and produced the result. We have no such condition here. The oil on the floor may have made the place more dangerous for the plaintiff to do his work in. The same would be true of exposed machinery or other obstructions. There was no defect in the machine itself. It moved very slowly, and in the direction from the operator whose hands were expected to come in contact with it. The danger consisted in the inability to stop the machine while under tension in case his hand got so far into the machine as to be caught. The oil on the floor did not create that danger. Nor was there any necessary or natural causal connection between the oil on the floor and such inability to stop the machine. The oil on the floor may have been the originating cause of the plaintiff's injury, but we cannot

say from the evidence, as a matter of law, that it was "the *efficient* cause" of the injury, as defined by this and other courts. *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 279, 72 N. W. 735; *Pautz v. Plankinton P. Co.* 118 Wis. 47, 51, 94 N. W. 654, and cases there cited. In the first of these two cases the jury found that the plaintiff sustained the injury "by falling upon uncovered machinery after being rendered unconscious by the fumes of gas escaping from a kiln in a room below where he was at work." This court has held that:

"An employer who was negligent in keeping a large rotary saw partially uncovered is not relieved from liability for an injury to an employee by the fact that an accidental slip of the employee's foot combined with said negligence of the employer to cause the injury." *Darcey v. Farmers' L. Co.* 87 Wis. 245, 58 N. W. 382; *S. C.* 91 Wis. 654, 65 N. W. 491; *S. C.* 98 Wis. 573, 74 N. W. 337.

See, also, *Shepherd v. Morton-Edgar L. Co.* 115 Wis. 522, 92 N. W. 260. Thus it is said in a recent work on the subject of negligence that:

"Where, in a suit for personal injuries due to defective machinery, it appears that the defect (insufficiently protected knives) was due to the defendant's negligence and was the *immediate* cause of the injury, the fact that the initial and moving cause was the plaintiff's slipping on the floor, in which respect the defendant was not negligent, will not preclude a recovery." 4 Thompson, Comm. Law Neg. § 3857.

In support of that proposition the learned author cites, among other cases, *Swift & Co. v. Holoubek,* 60 Neb. 784, 84 N. W. 249; *S. C.* 62 Neb. 31, 86 N. W. 900; *Scandell v. Columbia C. Co.* 50 App. Div. 512, 64 N. Y. Supp. 232. Of course, under our decisions cited it is not necessary that the proximate cause of the injury should be the immediate cause of the injury. According to the evidence on the part of the plaintiff in the case at bar, he was informed that he could stop the machine at any time by stepping upon the lever, but as a matter of fact it could not be so stopped while in use and

under tension. That fact was not open and obvious upon inspection. The trial court ruled out the evidence as to those facts, and thereby, in effect, held as a matter of law that the failure of the defendant to notify the plaintiff of such concealed danger was not actionable negligence. After careful consideration we are forced to the conclusion that such ruling was error. *Thompson v. Edward P. Allis Co.* 89 Wis. 523, 62 N. W. 527; *McMahon v. Ida M. Co.* 95 Wis. 308, 70 N. W. 478; *McDougall v. Ashland S.-F. Co.* 97 Wis. 382, 73 N. W. 327. In the last of these cases it was held that:

"If a master employs a servant to do work in a dangerous place, or where the mode of doing the work is dangerous, though apparent to a person of capacity and knowledge of the subject, yet, if the servant employed to do such work or in such a place, from youth, inexperience, ignorance, or want of general capacity, may fail to appreciate the danger, it is a breach of duty on the part of the master to expose him to such dangers, even with his own consent, unless he first gives him instructions or cautions sufficient to make him comprehend them and do his work safely, with proper care on his part."

See, also, *Jensen v. Hudson S. Co.* 98 Wis. 73, 82, 73 N. W. 434; *Shepherd v. Morton-Edgar L. Co., supra.*

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

THE STATE, Respondent, vs. NERGAARD, Appellant.

February 22—March 14, 1905.

Fish and game: Preservation: Constitutional law: Unlawful shipment: Forfeitures: Pleading: Evidence: Cross-examination of defendant: Place where fish were taken: Court and jury: Degree of proof necessary.

1. The state has the right to enact reasonable police regulations to preserve for its people the fish and game within its limits. It may prohibit the shipment or sale of more than a given quan-

tity within a given time by any one person; and such a prohibition is not an unconstitutional infringement upon private property rights.

2. Under sec. 1498*g*, Stats. 1898, making it the duty of district attorneys to prosecute actions for violation of the fish and game laws when complaint is made by the state warden or any deputy, the complaint in an action in justice's court to recover a forfeiture for such a violation, if it appears on its face to be made by one of the officers named, need not state that it is made on behalf of the state, notwithstanding the general provisions of sec. 3602 in that regard.
3. In an action to recover a forfeiture for a violation of the fish laws, it was not a prejudicial error to permit defendant, on his cross-examination, to be asked as to a prior arrest for a similar offense, where in answering the question he voluntarily stated that he had been convicted of such offense.
4. It was not error nor an abuse of discretion in such a case to compel defendant, on his cross-examination, to answer the question whether he was not constantly under surveillance of the officers of the law while in business as a fish dealer at another place, and whether they did not frequently take fish from his possession.
5. The question being whether certain pike, which had been shipped to defendant from O. on Lake W., had been taken from that lake, testimony of game wardens having jurisdiction in that vicinity that at about the time of the shipment pike were caught in large quantities in said lake, more than sufficient to satisfy the local demand, and that they knew of none being shipped in from other points, was admissible.
6. Testimony of a witness that she knew the kind of pike taken from Lake W., and that those in question were not the same kind of fish, but were much larger, was sufficient to render improper an instruction that it appeared by the undisputed evidence that the pike in question were taken from said lake.
7. Sec. 23, ch. 358, Laws of 1901 (providing, in effect, that shipments of fish from inland points in the state shall come under the provisions of law pertaining to shipment of fish taken from the inland waters of the state), has no application to a case where the shipment complained of was from a city situated upon the outlying waters of the state, although the fish had previously been shipped to that city from an inland point. In such a case, therefore, the fact that the fish had originally been shipped from an inland point did not raise a conclusive presumption that they had been taken from inland waters.

8. Under secs. 3294, 3295, Stats. 1898, in a civil action to recover a forfeiture for a violation of the fish and game laws which is not a misdemeanor, the state need not establish its case beyond a reasonable doubt, but only by a preponderance of the evidence.

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Reversed.*

This is an action to recover a forfeiture for an alleged violation of ch. 358, Laws of 1901, as amended by ch. 437, Laws of 1903, known as the fish and game law. The defendant was convicted in justice's court and appealed to the circuit court, where the action was tried before a jury. The state's evidence tended to show that on January 18, 1904, the defendant, who was a wholesale and retail dealer in fish at Kenosha, received from one Budzisz, a fish dealer in Oshkosh, seven barrels of pike, weighing from 185 pounds to 290 pounds per barrel; that on the afternoon of the same day six barrels of the shipment were taken from the defendant's store, by an expressman employed by him, to a barn in the city of Kenosha; that at about 5 o'clock a. m. upon the following morning these six barrels were taken from the barn in a sleigh accompanied by one Christensen, an expressman, and C. Nergaard, the defendant's brother, and carried in the sleigh several miles southwestward and across the state line to the village of Russell, in the state of Illinois, where they were shipped by rail to a fish dealer in Chicago; that said Nergaard was an employee in the defendant's store in Kenosha. There was no direct evidence as to where the fish were caught, but there was evidence by deputy game wardens familiar with the conditions on Lake Winnebago to the effect that in January large quantities of pike are caught in Lake Winnebago, and that they know of none being shipped in from any other points. The defendant's testimony tended to show that the six barrels of fish which were taken to Russell had been sold by him to his brother and that he had nothing to do with them

after such sale; and, further, that the fish so shipped were not the identical fish received from Oshkosh.

The jury returned a verdict for the state, and judgment was rendered thereon for a forfeiture of $50 and costs, from which the defendant appeals.

For the appellant there was a brief by *Cooper, Simmons, Nelson & Walker,* and oral argument by *John B. Simmons.*

For the respondent there was a brief by *Albert E. Buckmaster,* district attorney, and by the *Attorney General* and *Walter D. Corrigan,* first assistant attorney general, and oral argument by *Mr. Buckmaster* and *Mr. Corrigan.*

WINSLOW, J. The portion of the fish and game laws of the state which is claimed to have been violated by the appellant is sec. 22, ch. 358, Laws of 1901, as amended by sec. 20, ch. 437, Laws of 1903, which provides in substance that it shall be unlawful to transport or offer for transportation to any point within or without the state any fish taken from the inland waters of the state, except: (1) One package (not including trout) containing not more than twenty pounds (or in lieu thereof two fish of any weight), provided not more than one shipment a week is made by the same person; (2) any package of fish from inland waters (except trout) containing more than twenty pounds may be transported to any point within this state if accompanied by the shipper and marked as provided by law, provided that pike from outlying waters may be transported from an outlying water point to points within the state without being accompanied by the shipper, except during the closed season; (3) the section does not apply to certain varieties of fish which are specifically named and do not include pike; (4) shipments of trout of any variety taken from inland waters, not exceeding twenty pounds in weight, may be made to points within or without the state when accompanied by the shipper, not more than one shipment per week being made by the same person. Any vio-

lation of the section is punished by a forfeiture of not less than $25 nor more than $100, and by seizure and confiscation of the shipment.

The charge made in the present case is that the defendant violated the law by transporting from Kenosha to a point outside of the state more than two packages of fish, each containing more than twenty pounds, taken from the inland waters of the state, to wit, Lake Winnebago. That the packages claimed were in fact transported from Kenosha to a point outside of the state at the time charged stands uncontradicted in the case, and the only questions of fact in serious dispute upon the trial were (1) whether the fish in question were pike taken from the inland waters of the state, and (2) whether the defendant by his agents transported them from Kenosha to Russell. Before proceeding to the consideration of the detail errors which the appellant assigns upon the trial of these questions of fact, however, it seems proper to consider the main question raised in the case, namely, the question of the constitutionality of the law.

The appellant claims that this section violates several provisions of both the state and federal constitutions, namely: sec. 1, art. I, of the constitution of the state, which declares the inherent right of all men to life, liberty, and the pursuit of happiness; also sec. 13 of the same article, which provides that the property of no person shall be taken for public use without compensation; also the fifth amendment to the federal constitution, which provides that no person shall deprived of life, liberty, or property without due process of law, and that private property shall not be taken for public use without just compensation; also the fourteenth amendment to the same constitution, which prohibits a state from abridging the privileges or immunities of citizens of the United States, and from depriving any person of life, liberty, or property without due process of law, and from denying to any person the equal protection of the laws. As these several claims all are

based upon one contention, namely, that fish, when lawfully taken, become private property of the captor, with the absolute right of disposition, they may all be considered together. As above indicated, the appellant's claim is that when fish have been lawfully taken they become private property, and that any interference with the use, sale, or disposition thereof is an unconstitutional infringement upon property rights. The appellant's counsel, with much ability, contends that this claim is justified by the decision of this court in the case of *Rossmiller v. State,* 114 Wis. 169, 89 N. W. 839; and he also cites in support thereof *State v. Saunders,* 19 Kan. 127, and *Territory v. Evans,* 2 Idaho, 658, 23 Pac. 115. As to the two cases last named, they both proceeded upon the idea that a statutory prohibition of the right to ship out of the state game lawfully taken within the state was a violation of the interstate commerce clause of the federal constitution, and, as these cases were distinctly overruled upon this point by the United States supreme court (which is necessarily the final tribunal on this subject) in the case of *Geer v. Connecticut,* 161 U. S. 519, 16 Sup. Ct. 600, we do not feel called upon to consider them seriously. In the *Rossmiller Case* it was held by this court that ice formed upon the public waters of the state was not state property in a proprietary sense, and that a law which attempted to declare it the absolute property of the state, and authorize the state to sell it for revenue, and interdict its transportation out of the state unless purchased of the state, violated both the fourteenth amendment of the federal constitution and sec. 13, art. I, of the state constitution. There was here involved no question of police regulation, only the question of the right of the state to traffic in ice formed on the public waters of the state, as though it had an absolute proprietary ownership thereof; and while the right of the people to take and appropriate to themselves, as part of their common heritage, such ice, is fully recognized and classed with the right of fishing and fowling, the paramount right of

the state to enact reasonable police regulations to preserve for its people the continued existence of a valuable food supply is expressly recognized. It is this latter question which is involved in the present case.

We believe it has never been seriously denied (and it is now certainly too late to deny) that the state has the right, in the exercise of its police power, to make all reasonable regulations for the preservation of fish and game within its limits. It may ordain closed seasons; it may prescribe the manner of taking, the times of taking, and the amount to be taken within a given time, as it may deem best for the purpose of preserving and perpetuating the general stock. In the absence of legislation the citizen may doubtless pursue, take, and dispose of fish and game as he sees fit and without restraint, so long as he violates no private rights; but when the state steps in and makes proper police regulations, the citizen takes his right of fishing or fowling hampered by such regulations; in other words, his right is the right which the state leaves to him, no more and no less. The modes in which the state may limit the amount to be legally taken are various. It may doubtless interdict the taking of certain game for a series of years, if it deem such course necessary for the preservation of the species, or it may prohibit the taking of more than a certain amount by any one person within a given time. We do not perceive why it may not also, as a means of accomplishing the same end, prohibit the shipment or sale of more than a given quantity within a given period of time. It is well understood that the most serious danger to the preservation of fish or game lies in the taking thereof in large quantities for the purposes of sale in great cities, and it would seem that the most effective way to prevent the depletion of the waters by the wholesale taking of fish therefrom may be to prohibit the shipment or sale in large quantities or at frequent intervals. But whether this method of regulation be the most effective method or not, we see no reason for pronouncing it unreasonable or uncon-

stitutional. This entire subject has been so exhaustively and satisfactorily treated by the supreme court of the United States in the case of *Geer v. Connecticut, supra,* where the validity of a similar law of the state of Connecticut was upheld, that it seems unnecessary to enlarge upon it further.

We pass now to the consideration of the detail errors alleged:

1. This is an action to recover a forfeiture, originally brought before a justice of the peace, and the sworn complaint was made by one Charles B. Reinardy, who stated therein that he is a deputy of the state fish and game warden, but did not state that he made the complaint on behalf of the state. It is claimed that this omission is fatal, for the reason that by sec. 3602, Stats. 1898, governing all complaints in civil actions before justices upon which a warrant of arrest is to be issued, it is required that the sworn complaint shall be made by the plaintiff or by some one in his behalf. A similar provision with regard to affidavits for attachment has uniformly been held to mean that, where the affidavit is made by a third person, the affidavit must contain the statement that it is made on behalf of the plaintiff. *Maguire v. Bolen,* 94 Wis. 48, 68 N. W. 408. We should probably consider this controlling, were it not for the fact that it is provided by sec. 1498*g,* Stats. 1898, that it shall be the duty of district attorneys to prosecute actions for violations of the fish and game laws when complaint is made by the state fish and game warden or any deputy. This provision relating to this special class of actions seems to clearly indicate the legislative purpose to be that, where the complaint appears on its face to be made by one of the officers named, it shall be sufficient to initiate the prosecution, and we so hold.

2. The defendant was a witness in his own behalf, and upon his cross-examination it appeared that he had been a fish dealer in Oshkosh before he came to Kenosha. He was then asked whether he was not constantly under surveillance

of the officers at Oshkosh, and whether they did not frequently take fish from his possession. Objection was made to the question, but it was overruled, and the witness practically admitted that such was the fact. Subsequently he was asked whether he had not been arrested for violation of the fish laws in Oshkosh, and objection to the question was overruled on the ground that the evidence bore on his credibility, and he answered that he was arrested once and fined. In the charge of the court the jury were instructed that this evidence was only to be considered as affecting the defendant's credibility, and had no other bearing on the case. In *Thornton v. State,* 117 Wis. 338, 93 N. W. 1107, it was held error to ask a witness whether he had not been previously arrested for another offense, but, that question having been at once followed by a question and answer showing previous conviction of an offense following that arrest, it was held that there was no prejudicial error in the proof of his arrest, because this was a fact necessarily inferred from the fact of his conviction. So, in the present case, the witness having voluntarily testified, without objection, to his subsequent conviction, we cannot regard the ruling as to the proof of arrest as prejudicial error.

But the question still remains whether it was error to compel the witness to answer the question as to his being under constant surveillance of officers of the law while in business at Oshkosh. The general principle that a witness should not be asked and cannot be compelled to answer questions as to the commission of previous offenses for which he is not on trial, except in certain well-defined classes of cases, is very thoroughly established, and has been frequently laid down by this court. *Fossdahl v. State,* 89 Wis. 482, 62 N. W. 185; *Buel v. State,* 104 Wis. 132, 80 N. W. 78; *Paulson v. State,* 118 Wis. 89, 94 N. W. 771; *Barton v. Bruley,* 119 Wis. 326, 96 N. W. 815. The question whether he was not constantly under surveillance of the officers of the law while in business

at Oshkosh does not, however, come within this category. There has always been a certain latitude allowed to trial courts as to the cross-examination of a witness with regard to his previous life. A considerable discretion has been vested in such courts with regard to inquiries into the previous life and character of one who has offered himself upon the witness stand as a person worthy of belief. While questions regarding previous supposed crimes are not allowed, it has been very wisely deemed that both court and jury are entitled to know the manner of life of the witness to a reasonable extent—where he has been, and what have been his occupations, and the circumstances under which he has lived. All this has been deemed as a legitimate field of inquiry, not as bearing upon the question of his guilt or innocence of the offense for which the witness is presently being tried (if he be the party on trial), but as having a proper bearing upon his credibility as a witness. The field within which such inquiries may be made is necessarily ill defined, but it is very well recognized, and the question as to how far cross-examination in this direction may go is almost universally said to be a question resting in the sound discretion of the trial court, whose opportunity for judging how far such a cross-examination is justified by the circumstances of the case and the appearance of the witness on the stand is far better than that of an appellate court. The rule is wise and helpful in the administration of justice, as trial judges frequently have occasion to realize; and, while great care should be taken to see that a witness is not unnecessarily degraded, an appellate court will not reverse a judgment where such inquiries have been permitted, except for abuse of discretion. This rule was recognized in *Buel v. State, supra,* and is laid down in the textbooks. 3 Jones, Evidence, § 842. We are unable to say that there was any abuse of discretion in this respect in the present case.

3. Two deputy game wardens, called by the state, one of

whom had jurisdiction over the city of Oshkosh, and the other on Lake Winnebago in the immediate vicinity, were allowed, against objection, to testify in substance that during January pike were caught in Lake Winnebago, at and near Oshkosh, in large quantities, and more than sufficient to satisfy the local demand, and they knew of none being shipped in from other points. We see no error in the admission of this evidence. While not as persuasive as more direct evidence, it legitimately tended to show that the pike in question were taken from Lake Winnebago.

4. As stated at the outset of this opinion, there were but two disputed questions of fact in the case: (1) Whether the fish transported were taken from the inland waters of the state, and (2) whether the defendant by his agents transported them to Russell. Upon the first of these questions the trial court instructed the jury in substance that, it appearing by the undisputed evidence that the fish were shipped from Oshkosh, the fact that the fish were taken from inland waters was conclusively proven. This instruction seems to have been based upon sec. 23, ch. 358, Laws of 1901, which provides in substance that any package of fish offered or received for transportation at any point in the state not situate on any of the outlying waters of the state shall come under the provisions of law pertaining to the shipment of fish taken from the inland waters of the state. The meaning of this provision seems to be that, when fish are shipped from any point in the state not situated on the outlying waters, it makes no difference where the fish were taken. We express no opinion as to the validity of this section. Conceding it to be valid, we are unable to see how it applies in any way to the present case. It is true that the fish were originally shipped from Oshkosh, which is upon inland waters, to Kenosha, which is upon outlying waters, but it was not charged, nor does the evidence show, that the defendant had anything to do with this shipment. It was made by Mrs. Budzisz, acting for her

husband, and accompanied by her to Kenosha, and we have been referred to no evidence which even tends to show that it was in violation of law. At all events it is certain that the defendant has not been prosecuted for making this shipment, but only for the shipment from Kenosha to Russell. Clearly, therefore, the last-named section has no application to the case, because the point where the shipment began was Kenosha, which is upon the outlying waters of the state, and hence not covered by the section. The logical result of the ruling complained of would seem to be that if a shipment of red herring or codfish of greater weight than twenty pounds were made from Oshkosh to Kenosha, they could not be shipped thence to any point, because they must be conclusively presumed to have been taken from the inland waters of the state.

It was attempted upon the argument to sustain the instruction on the ground that the evidence that the pike in question were taken from Lake Winnebago was undisputed. We are unable to so hold. While there was evidence to this effect amply sufficient to sustain a verdict had the question been submitted, we cannot say that it was uncontroverted. There was direct evidence by Mrs. Budzisz to the effect that she knew the kind of pike taken from Lake Winnebago, and that the pike in question were not the same kind of fish, but were a great deal larger. The question was for the jury under proper instructions, and the charge in this respect was erroneous.

5. The court charged the jury that it was not necessary that the state establish its case beyond a reasonable doubt, but only by the preponderance of the evidence, and this instruction is claimed to be erroneous. We find no error in the charge in this respect. The action is brought to recover a forfeiture for an act which is not a misdemeanor. Sec. 3294, Stats. 1898, provides that, in all such cases not otherwise provided for (and the present case is not), the forfeiture may be sued for and recovered in a civil action. Sec. 3295 pro-

vides that "every such action . . . shall be brought in the name of the state of Wisconsin, and the summons, pleadings and *proceedings* therein shall be the same as in civil actions." In view of these express statutory provisions, there is no room for controversy.

We have discovered no other claims of error that require discussion. The judgment must be reversed for the single error in the charge hereinbefore discussed.

By the Court.—Judgment reversed, and action remanded for a new trial.

BRINSLEY, Appellant, vs. SCHULZ and another, Respondents.

February 22—March 14, 1905.

Malicious prosecution: Advice of counsel: Evidence.

1. If a criminal prosecution was commenced in good faith under the advice of counsel, particularly of the proper prosecuting officer, after a full and fair statement to him of all the facts known to the complainant or believed by him to exist, such complainant is not liable for malicious prosecution.
2. In an action for malicious prosecution it was competent for defendants to testify generally that they fully and fairly stated all the facts to the district attorney and acted upon his advice; and where this testimony was undisputed it was proper to direct a verdict in their favor.

APPEAL from a judgment of the circuit court for Kenosha county: ORREN T. WILLIAMS, Judge. *Affirmed.*

Action to recover damages for malicious prosecution. The complaint was to the effect that defendants, November 15, 1898, for the purpose of injuring plaintiff, maliciously and without probable cause procured his arrest upon the charge of having embezzled $285, possessed by him as agent of the Pike Woods Camp, No. 391, an association of the Modern Woodmen of America; that such proceedings were duly taken

pursuant to such arrest that plaintiff was imprisoned in the county jail of Kenosha county for a considerable length of time, awaiting a hearing before the justice of the peace who issued the warrant; that he was given a hearing December 13, 1898, when the action was dismissed on motion of the district attorney; that he suffered damages by reason of the facts in the sum of $5,000. Judgment therefor with costs was demanded.

Defendants answered to this effect: On November 9, 1898, plaintiff was, and for a long time prior thereto had been, in the employ of the organization mentioned in the complaint. Between May 25, 1896, and the aforementioned date as such employee he had in his possession of the moneys of such association $363.80, and being so possessed he converted said money to his own use. Upon due demand being made upon him to restore the same to such association he refused to do so. Defendants as members of such association, November 15, 1898, were empowered to take such proceedings as might be deemed necessary to recover the money so misappropriated. Thereafter they with plaintiff called upon the duly authorized attorney of such association, who was duly authorized to practice the profession of law, and discussed the matter, at which time plaintiff admitted the facts alleged, but neglected to produce the money or to pay the same to the association. The defendants made a full statement and explanation of all the facts to said attorney and were by him advised that plaintiff was guilty of the crime of embezzlement and that they should place the matter before the district attorney of the county. Thereupon they visited such attorney and fairly and fully stated all the facts to him. He then advised them to make the complaint upon which plaintiff was arrested, and visited a justice of the peace, before whom the warrant was sworn out, and himself drafted the complaint therefor. Thereafter plaintiff made restoration of the $363.80, and at his request, and by consent of the district attorney, the crim-

inal proceedings against him were dismissed. Defendants acted in good faith in all proceedings referred to and were guided by the district attorney upon a full statement of the facts to him.

On the trial evidence was produced on behalf of the defendants, claimed to conclusively establish the allegations of the answer as to their having fully and fairly stated all the facts to the district attorney and his having advised them to swear out the complaint for plaintiff's arrest. At the close of the evidence on both sides a verdict of no cause of action was directed. Judgment was rendered in favor of the defendants for costs upon such verdict, from which this appeal was taken.

Wallace Ingalls, for the appellant.

For the respondents there was a brief by *James Cavanagh* and *Jacob C. Kroncke,* and oral argument by *Mr. Cavanagh* and *Chester D. Barnes.*

MARSHALL, J. In this class of cases one of the elements necessary to plaintiff's right to recovery is want of probable cause for the commencement of the alleged malicious prosecution. If the evidence, in the most favorable view thereof in plaintiff's favor which it will reasonably bear, fails to establish that sufficiently to warrant a reasonable belief in its existence, it is the duty of the court, upon a motion being made therefor, to direct a verdict in defendant's favor. One of the most efficient ways of negativing a *prima facie* showing in that regard and establishing affirmatively probable cause is to prove that the prosecution was commenced under the advice of counsel, particularly of the proper prosecuting officer, after a full statement to him of all the facts known to the defendant. It makes no difference in such a case whether the facts supposed to exist do so or not; if there is an honest belief in such existence and the supposed facts are fully and fairly stated to counsel to obtain proper guidance in the mat-

ter, and upon his advice as to the sufficiency of the same the prosecution is in good faith commenced, that is enough. Such circumstances when fully established show, as a matter of law, absence of malice and presence of probable cause, precluding any liability for malicious prosecution. *Messman v. Ihlenfeldt,* 89 Wis. 585, 62 N. W. 522; *Small v. McGovern,* 117 Wis. 608, 94 N. W. 651.

If such were not the law, there would be so much risk in instituting criminal prosecutions that crime to a great extent would probably go unpunished. Few men would make complaint against a wrongdoer and take the chances of being mulcted in damages for malicious prosecution if it should finally turn out by the verdict of the jury, or otherwise, that the accused could not be convicted. It is essential to good government that one who has probable cause to believe another has committed a criminal offense may, as regards liability to that other, put the proper instrumentalities in motion for such other's punishment if he is in fact guilty. It is just as essential to good government that the judgment of men sufficiently learned in the law to be entitled to practice the profession thereof, deliberately given upon the facts as to any situation, that they involve criminal responsibility, should be deemed probable cause for commencing the proper action to enforce such responsibility.

Applying the foregoing to the record in this case, it seems the learned trial court was justified in directing the verdict in respondents' favor. As we understand the evidence, it is undisputed that they made a full statement of all the facts within their knowledge to the attorney for the institution whose money it was supposed had been misappropriated by appellant; that such attorney pronounced his conduct embezzlement, and advised respondents to lay the whole matter before the prosecuting officer of the county for such action as he might think best; that following that suggestion they made a full statement of all the facts within their knowledge to such

officer, and were advised by him that appellant was a proper subject for prosecution for embezzlement; and that such officer visited a justice of the peace with them and there drew, or dictated to another who drew, the complaint whereby the prosecution was instituted. Counsel for appellant insist that the proof failed to show conclusively that all facts material to the matter known to respondents were stated to the district attorney. That seems to be based on the theory that there were such facts, which neither respondents nor counsel testified, specifically, were brought to the latter's attention. The record shows that *Newberry* testified in general terms that when he made the complaint he believed that *Brinsley* had embezzled the money; that he fully and fairly stated all the facts to the district attorney and followed his advice in the matter. Respondent *Schulz* testified, substantially, thus: We went to the district attorney's office and stated the case fully to him and upon his recommendation and advice obtained the warrant for the arrest. I stated fully all the facts within my knowledge at that time. Upon that statement the district attorney advised the making of the complaint. It was perfectly competent to testify in that general way. If there were any facts within respondents' knowledge material to the matter, which they did not state to the district attorney, appellant's counsel should have shown that by cross-examination or in some other proper way. As the evidence stood when the motion to direct the verdict was made, there was the undisputed testimony of both defendants, as indicated. Under those circumstances it would have been plain error for the court to deny the motion for a verdict in respondents' favor.

By the Court.—The judgment is affirmed.

WIESMANN, Appellant, vs. SHANLEY and others, Respondents.

February 22—March 14, 1905.

Appealable order: Striking out parts of pleading.

An order striking out, as irrelevant, portions of a complaint is not appealable. It does not determine the action or prevent a judgment from which an appeal might be taken, within the meaning of subd. 1, sec. 3069, Stats. 1898.

APPEAL from an order of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Dismissed.*

The appeal is by plaintiff from an order striking out, as irrelevant and redundant, certain portions of the complaint.

Henry Wiesmann, for the appellant.

Peter Fisher, for the respondents.

DODGE, J. Orders striking out parts of pleadings were in some cases held appealable under subd. 4, sec. 3069, R. S. 1878, as involving "the merits of the action or some part thereof." *Freeman v. Engelmann T. Co.* 36 Wis. 571; *Carpenter v. Reynolds,* 58 Wis. 666, 17 N. W. 300; *Dewald v. Dewald,* 89 Wis. 353, 62 N. W. 175. That subdivision was eliminated by ch. 212, Laws of 1895. *Adamson v. Raymer,* 94 Wis. 243, 250, 68 N. W. 1000. Since then no statute is claimed to confer appealability upon such orders, except, perhaps, subd. 1, sec. 3069, Stats. 1898. That, however, cannot be effective, for the order, much as it may affect a substantial right, in no wise determines the action, nor prevents a judgment from which an appeal might be taken. *Flannigan v. Lindgren,* 102 Wis. 445, 100 N. W. 818. No statute authorizing the present appeal, we are without jurisdiction to entertain it.

By the Court.—Appeal dismissed.

LOUNSBURY, Administrator, Respondent, vs. DAVIS and others, Appellants.

February 22—March 14, 1905.

Master and servant: Negligence: Death of servant: Fall of derrick in quarry: Assumption of risk: Court and jury: Special verdict: Instructions: Evidence: Pleading: Surplusage.

1. Upon evidence tending to show that the fall of a derrick in a quarry, whereby an employee therein was killed, resulted from the negligent fastening of a guy anchor under the personal direction of one of the employers; that the deceased had nothing to do with such fastening; and that it was not within his observation in the usual course of his employment, the question whether deceased had assumed the risk is *held* to have been one for the jury.
2. In the absence of any request for specific instructions or the submission of a separate question as to assumption of risk, the failure to submit that issue otherwise than as it was included in the question whether deceased was guilty of contributory negligence, was not error.
3. It appearing from the evidence that the fall of the derrick was due either to the overloading thereof or to the pulling out of the guy anchor at the point where it was weighted down, it was not error to refuse an instruction that if it was as probable that the accident resulted from an unknown cause as from any cause charged, then defendants cannot be said to have been guilty of negligence in respect to any cause charged.
4. It was error to permit a witness to testify that the guy anchor pulled out because there was not stone enough weighting it down, since he thereby gave his opinion upon a question to be passed upon only by the jury.
5. The exclusion of evidence tending to show that it was the duty of the deceased, as a foreman, to look after the security of the guy anchor, was error.
6. Where, in an action for death negligently caused, the complaint stated fully all the facts constituting a cause of action under secs. 4255, 4256, Stats. 1898, in favor of the surviving widow, it was proper to treat as surplusage a statement at the close that by reason of the death of the intestate "*his estate* was damaged," etc.

APPEAL from a judgment of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Reversed.*

This is an action to recover damages upon the ground that defendants' negligence caused the death of plaintiff's intestate. It is alleged that plaintiff is the administrator of the estate of Carl Strube, deceased, and that *Edgar P. Davis* and *Charles H. Davis* are the executors of the last will and testament of James E. Davis, deceased; that at the time in question *Charles H. Davis* and James E. Davis were copartners under the firm name of Davis Bros.; that they were the owners of a stone quarry and conducted a quarry business at Menomonee, Waukesha county; that Carl Strube, the deceased, was on the 8th day of July, 1901, and for a long time prior thereto had been, in the employ of and engaged in this business of the Davis Bros.; that he was fifty-six years of age, able-bodied and healthy, and able, up to the time of his death, to do all kinds of manual labor and to earn the wages of a good and competent workman; that his wife, Hannah, and two minor children survive him; and that he maintained and supported his family.

It is further alleged that the deceased, Carl Strube, was injured through defendants' negligence on July 8, 1901, while engaged in defendants' quarry, the injuries resulting in his immediate death. The negligence charged is alleged to have consisted in a negligent and careless construction and erection of a derrick used in conducting and operating the defendants' quarry business. It is averred that a certain cable or guy rope, running from the top of the center piece or mast of the derrick to the ground, where it was anchored or fastened so as to hold the derrick erect, was so carelessly and negligently fastened or anchored as to make it insufficient and insecure as an anchor and guy, thereby rendering the derrick unsafe and dangerous in conducting the usual business of hoisting stones from the quarry bed into cars for shipment or other purposes. It is claimed that the negligence of the

defendants caused the derrick to fall and thereby injure the plaintiff's intestate while he was engaged as an employee in conducting their business on the day in question.

It is admitted that defendants were a copartnership and owned the quarry and were engaged in the stone quarry business; that plaintiff's intestate was in their employ as a laborer in conducting the quarry business at the time and before the accident; and that he died from the effects of the injuries received at the time in question. There is no dispute but that his wife and a number of children, two of whom are minors, survived him, and that he maintained a household and applied his earnings to the support of himself and family.

It appeared in evidence that plaintiff's intestate had been in the employ of the defendants as a workman in the quarry a number of years prior to the time of the accident; that derricks were used in removing the stone from the quarry; that these derricks were moved from ledge to ledge from time to time as the quarrying progressed; and that the derrick in question was held erect by seven guys or wire cables, one end attached to the top of the center piece or mast, and the other end attached to an anchor placed on the ground at a distance of about 125 feet from the base of the derrick. These anchors, with the exception of two, were fastened and weighted down by stones in two tiers divided by the cable, piled on and in front of the anchors or "dead men." The anchor in question was so fastened and weighted on Saturday, July 6th, under the direction and supervision of *Charles H. Davis,* one of the defendants, after the derrick was moved from its former position. Carl Strube did not take part in the moving of the derrick or in fastening the anchor, nor did he subsequently observe how the one which pulled out or any other anchor had been fastened and weighted down by *Mr. Davis. Chas. H. Davis* and his brother had the charge and management of the quarry and the manner of prosecuting the quarrying. The labor in the quarry was carried on by two sets of workingmen

in charge of persons selected by defendants, called "block foremen," of whom Carl Strube was one, and in the absence of the Davis brothers these block foremen had charge of the employees and the quarrying in their respective blocks.

Chas. H. Davis, while testifying as a witness called by defendants, was asked the question: "If there is anything wrong with the derrick, has he [block foreman] any duty connected with it?" This question was excluded by the court upon objection. Charles Strube, a witness for plaintiff, upon direct examination was asked: "Could you tell why this dead man [anchor] pulled out, from your observation and experience—any observation you made of this very derrick in question? (Objection by defendants. Overruled.) *Answer.* Because there was not stone enough; else it would not have pulled out." It appeared that at the time of the accident the anchor of this guy cable had become freed by pulling out from under and through the pile of stone placed on and about it, and that when so freed the guy permitted the derrick mast with boom and loaded platform to fall, and that plaintiff's intestate was injured in attempting to escape from the perils of such falling apparatus.

The case was submitted to the jury upon special verdict, and it was therein found: (1) That Carl Strube died from the effects of the injuries received; (2) that the defendants were guilty of a want of ordinary care in not furnishing a reasonably safe derrick for use in conducting their quarry business; (3) that such negligence of defendants was the proximate cause of the death of plaintiff's intestate; (4) that the deceased was not guilty of any want of ordinary care: (5) that plaintiff's damages were $1,600. Judgment was awarded on this verdict for the damages and costs. This is an appeal from such judgment.

For the appellants there was a brief by *Roemer & Aarons,* and oral argument by *J. H. Roemer.*

For the respondent there was a brief by *Ryan, Merton & Newbury,* and oral argument by *C. N. Newbury.*

SIEBECKER, J. Appellants contend that under the testimony there can be no dispute that the defective construction in weighting down and fastening the guy anchor was an open and obvious defect, of which respondent's intestate, as an experienced quarryman, must be presumed to have had knowledge, and that he therefore assumed the risk incident to the use of the derrick in conducting appellants' business. We cannot accede to this view. It appears that the deceased took no part in moving and resetting the derrick and guy anchors on the Saturday preceding the accident, nor does it appear that his attention was directed to the manner in which the anchors had been weighted down and fastened at that time. It is undisputed that one of the proprietors took full charge and direction of this moving and resetting of the derrick. From these circumstances it follows that it was appellants' duty to have the anchors so fastened as to make it reasonably safe for operating the derrick in the usual manner of conducting appellants' quarry business. Deceased had the right to assume that they were so fastened and secured, in the absence of proof that he, in the exercise of reasonable care, ought to have observed it, or was charged with a duty as block foreman (to which reference will be made hereafter) to examine the apparatus.

It appears that the anchors were placed at a point about 125 feet from the derrick mast, and located outside of and beyond the field of operation on the ledges in the quarry, where the deceased and other employees were engaged in performing the usual work in conducting appellants' business. It does not appear that the deceased and the other employees in their daily occupations would or could readily observe the manner in which the anchors had been fastened and weighted down. Since there is evidence tending to show that the accident to respondent's intestate resulted from a negligent fastening of the anchor by appellants, that the deceased had nothing to do with the fastening, and that it was not within his

observation in the usual course of his employment, it cannot be said as a matter of law that he had assumed the unusual dangers arising out of a negligent fastening of the anchors. In view of the evidence the question was one for the jury, under proper instruction by the court, as a species of contributory negligence, under the fourth question of the special verdict. In the case of *Hennesey v. C. & N. W. R. Co.* 99 Wis. 109, 74 N. W. 554, this question was so fully considered and discussed that further elaboration is unnecessary at this time.

It is urged that the court should have submitted the issue of assumption of risk in a separate question in the special verdict. Counsel places reliance for such contention upon the cases of *Hennesey v. C. & N. W. R. Co., supra,* and *Dugal v. Chippewa Falls,* 101 Wis. 533, 77 N. W. 878. The cases do not justify the contention. As stated in the *Hennesey Case:*

"Had the jury been carefully instructed upon the question of assumption of risk, and plainly told that it was a species of contributory negligence, and that, if they found that deceased did assume the risk of such unusual danger, then he was in law guilty of a want of ordinary care, . . . there would probably be no error in refusing to submit the specific question asked for, because the issue would thus have been covered."

No such instructions were given in that case and none were requested by defendant, but it was there held that in the absence of such instructions a written request in the form of a special question on the issue was proper and took the place of a request to instruct on the subject. No specific instructions nor question were asked for by appellants in the instant case upon this issue.

It is further claimed that the court erred in refusing to give the following instruction as requested:

"If it is as probable that the accident resulted from an unknown cause as from any cause charged, then the defendants cannot be said to have been guilty of negligence in respect to any cause charged."

The proposition thus submitted may be correct as a statement of a rule of law, but it has no application to the facts and circumstances before us. From the evidence adduced upon the trial there are but two theories to account for the derrick's falling. It was due to an overload which was being hoisted, or, if not to an overload, it must have been due to the fact that the anchor became detached and gave way at the point where it was weighted down. These two theories were properly covered by the verdict and the charge given.

Error is assigned upon the court's ruling in the admission and rejection of evidence. The witness Charles Strube was permitted over objection to answer the question: "Could you tell why this dead man pulled out, from your observation and experience—any observation you made of this very derrick in question?" to which he answered: "Because there was not stone enough; else it would not have pulled out." It was proper for the witness to testify fully as to the manner in which the anchor was constructed, the quantity of stones that were piled thereon, to give a full description of the manner in which they were piled on and about the anchor, and of their displacement after the accident. But this is the limit to which the evidence could properly be permitted to go. This limitation was plainly transgressed in the foregoing inquiry, and the witness was called upon and permitted to give his opinion upon an ultimate issue in the case, which can only be resolved by the jury. As stated in the case of *Maitland v. Gilbert P. Co.* 97 Wis. 476, 72 N. W. 1124:

"The rule is that experts are not to decide issues of fact; hence all questions calling for opinion evidence must be so framed as not to pass on the credibility of any other evidence in the case, else it will usurp the province of the jury and the court."

The admission of this evidence was error.

Another exception urged to a ruling on evidence pertains to the exclusion of evidence offered by appellants on the subject

of the duty of respondent's intestate as block foreman. Testimony was admitted descriptive of his duties while in the charge and management of the quarry; but when evidence was offered for the purpose of showing his duty in respect to any defects or a dangerous condition of the apparatus outside of his immediate surroundings in the quarry, it was excluded. This ruling was clearly erroneous. Whether or not the deceased, as block foreman, was charged with the duty of looking after the security of the anchor, is a material and very important question in view of respondent's claim that he was free from contributory negligence.

Exception is taken to the court's construction of the complaint in holding that the cause of action stated is one in favor of the widow of the deceased under the statute, and not one in favor of his estate. The distinctions between the two causes of action were pointed out in *Brown v. C. & N. W. R. Co.* 102 Wis. 137, 77 N. W. 748. The complaint fully and explicitly states all the facts necessary to constitute the cause of action for damages in favor of the widow. The pleader at the close added the statement that by reason of the death of respondent's intestate "his estate was damaged in the sum of five thousand dollars." The court disregarded this allegation and treated it as surplusage. This ruling was proper. A rejection of this statement in its entirety leaves a statement of facts in the complaint which clearly constitutes a cause of action under secs. 4255, 4256, Stats. 1898, in favor of the surviving widow, as it was evidently intended by the pleader.

By the Court.—The judgment is reversed, and the cause is remanded for a new trial.

OFF, Guardian, and another, Appellants, vs. HEINRICHS, Respondent.

February 23—March 14, 1905.

Ejectment: Description of land: Error in courses and distances: Fence as boundary: Adverse possession.

1. The description of land in a complaint in ejectment is sufficient if, by the aid of a surveyor and persons knowing the monuments and boundaries mentioned, the land can be found. A description designating the south boundary of the tract in question as the north boundary of one B.'s land is *held* sufficient, where the evidence and the finding of the court definitely established the exact location of such boundary.
2. According to the courses and distances in two conveyances by the same grantor to different grantees, there remained a strip between the two tracts conveyed, but one deed described the tract thereby conveyed as bounded on the south by the other tract, and the other deed referred to a corner of the first tract as being on the north boundary line of the second. There was a rail fence upon what was understood to be the line between the tracts, but in fact this was at one end about ten feet and at the other about eighteen feet south of the north line of the southern tract as described by courses and distances. The grantees and those claiming under them respectively occupied up to this line uninterruptedly and without dispute for more than twenty years, and during that time built a new division fence on such line, each building one half thereof. *Held*, that this established title by adverse possession up to said line in the owners of the northern tract.
3. After the title was so established, L., the owner of the northern tract, conveyed by the same description as in the original deed of that tract, and a plat was made and recorded, which, as to its south boundary, was in accordance with the courses and distances in said description, leaving a strip between such plat and the old fence line. Afterwards the southern part of the tract was reconveyed to L. by deed designating the southern boundary as the north line of the southern tract, the same as in the original deed—and L. thereupon resumed possession and occupancy up to the old fence line. *Held*, that the title up to such old fence line thereby became revested in L., although in the meantime the owner of the southern tract had recorded a plat, making the north line thereof the same as the south line of the plat above mentioned.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

This is an action of ejectment against *H. W. Heinrichs* to recover possession of land described in the complaint as follows: A strip of land off of the south side of the following described real estate: Said strip is about eighteen (18) feet wide at the easterly end, sixteen (16) feet wide at the middle point, and about ten feet (10) wide at the westerly point, to wit: The south seven and one-half acres of land off of the sixteen acres of land, more or less, in lot two (2), in section twenty-eight (28), town eight (8), range twenty-two (22) east, in Milwaukee county, Wisconsin, bounded by a line beginning in the section line between sections 28 and 29, twenty-six and two-thirds rods from the southwest corner of said lot two (2); running thence east one hundred rods (100), more or less, to low-water mark of Lake Michigan; thence on said line back to the place of beginning; thence north twenty-six and two-thirds rods to a post; thence east one hundred rods (100), more or less, to low-water mark of Lake Michigan; being the land formerly bounded on the south by Becker's and north by Steffen's land, in Milwaukee county, Wisconsin.

The answer is, in effect, a general denial. Both parties claim title through divers mesne conveyances from one Thomas Severn.

April 1, 1867, Thomas Severn conveyed by deed to August Loennecker the following described land: Part of lot two (2) in fractional section twenty-eight (28), town eight (8), range twenty-two (22) east, bounded as follows, viz.: Beginning at a post in the section line dividing sections twenty-eight (28) and twenty-nine (29), distant twenty-six and two-thirds ($26\frac{2}{3}$) rods from the southwest corner of said lot two (2); thence east one hundred (100) rods to low-water mark on Lake Michigan; thence back by the same to the place of beginning; thence north twenty-six and two-thirds ($26\frac{2}{3}$) rods to a post; thence east one hundred (100) rods to low-water

mark on Lake Michigan, containing sixteen (16) acres, more or less; and being also bounded on the south by August Becker's land, on the north by one Steffen's land, on the east by Lake Michigan, and on the west by Jacob Rader's land. On or before June 24, 1891, by descent and by divers mesne conveyances, the title conveyed by said deed from Severn to Loennecker became and was vested in Johanna Loennecker, and the plaintiffs derive their title through her.

On October 5, 1867, said Thomas Severn conveyed to August Becker the following land: Beginning at the southwest corner of lot two (2) of fractional section twenty-eight (28), in town eight (8) north, of range twenty-two (22) east; running thence east ten (10) chains to a point, a corner of Frederick Gram's land; thence by the same north three and four-hundredths (3.04) chains to a point; thence by the same east sixteen and fifty-hundredths (16.50) chains to low-water mark of Lake Michigan; thence back by the same course to the place of beginning; thence north six and thirty-hundredths (6.30) chains to a point, a corner of August Loennecker's land; thence by the same east twenty-five and eighty-hundredths (25.80) chains to low-water mark of Lake Michigan, containing ten acres, be the same more or less, county of Milwaukee, Wisconsin.

It appears from the evidence that a rail fence was built some time before 1867 upon what was understood to be the line between the tracts conveyed to August Loennecker and August Becker, above described. It would also appear, from the call in the deed to August Loennecker for the south boundary as August Becker's land, that Becker must have been in possession prior to the time he received his deed, as his deed appears to have been executed in October, while the deed to Loennecker was in April, 1867. However, it is undisputed that the rail fence existed between the two tracts in 1867, and that August Loennecker and those claiming title through him continued to occupy up to this fence; that the fence was rec-

ognized as the dividing line between the property of Loennecker and Becker, and in 1875 a new fence was built, by agreement between the parties, each building one half, upon the same line as the old rail fence. This occupancy by the Loenneckers under claim of title continued until 1891, at which time Johanna Loennecker executed a land contract to one Gether, and afterwards, in 1892, conveyed to him, by deed, the property, same description as in deed from Severn to Loennecker. Afterwards, on January 29, 1892, one William J. Kaul as president, and C. R. Gether as secretary, of a corporation known as North Lawndale Company, acknowledged a plat of a tract of land called "Glen Owen Plat," embracing part of the lands described in land contract from Loennecker to Gether, together with other lands, the south boundary of Glen Owen being 440 feet north of the southwest corner of lot 2. On the 2d day of March, 1892, C. R. Gether and wife conveyed to the North Lawndale Company the land in question, together with other land. April 29, 1895, the North Lawndale Company conveyed to said Gether the south seven and one-half acres of the sixteen acres formerly conveyed by Johanna Loennecker to Gether. On the same day said Gether and wife reconveyed to Johanna Loennecker said south seven and one-half acres, and she continued to occupy the premises up to the old fence until her death in 1900. January 8, 1892, August Becker and wife sold by land contract, or bond for deed, to C. D. Stanhope, the land deeded to him by Severn. January 13, 1892, Stanhope acknowledged a plat of land called "Stanhope Subdivision No Three," which plat shows the north boundary of land so platted to be 440 feet north of and parallel to south line of lot 2. January 9, 1893, Stanhope assigned an undivided one-half interest in said land contract to C. R. Gether, and on January 10, 1893, August Becker and wife conveyed by deed to Stanhope and Gether the land described in the land contract. August 31, 1896, Stanhope and wife conveyed to

Gether the land described in deed from Severn to Becker. August 31, 1896, Gether and wife reconveyed said land to August Becker. In 1900 Becker conveyed to defendant, and in 1901 defendant built a fence on a line ten feet north at the west end and eighteen feet north at the east end of the line of the old rail fence, and being on the north line of the description by courses and distances in deed from Severn to Becker. According to courses and distances given in deed from Severn to Becker, Becker's north line would be 415.8 feet north from the south line of lot 2, and the south line of the Loennecker tract 440 feet north of the south line of lot 2, leaving a strip of about twenty-five feet between the two tracts; but the old fence as the north boundary of the Becker tract was ten feet at west end, and eighteen feet at east end, farther south than the north line of the Becker tract, according to courses and distances specified in deed from Severn to Becker. This strip is the land in dispute in this action.

The action was tried by the court, and the findings of fact are substantially in accordance with the facts heretofore stated, except the court found that by the making and recording of Glen Owen plat, and the making and accepting of certain conveyances from the North Lawndale Company to Gether, and from Gether to Johanna Loennecker, Gether and Johanna Loennecker recognized as the true south boundary of the Loennecker land a line 440 feet north of and parallel to the south line of lot 2, being the south line of Glen Owen plat; and further found that the strip of land in suit was not included within the description in deed from Severn to Loennecker made in 1867, nor in deed from Johanna Loennecker to Gether made in 1892, nor within the description of the intervening or subsequent conveyances, but that said strip was included within the description in deed from Severn to Becker, and subsequent conveyances under which defendant claims, and that the plaintiffs and those under whom they claim had not held adverse possession of the strip of land in

suit for a period of twenty years continuously immediately preceding the commencement of this action. And the court found, as conclusions of law, that defendant was entitled to judgment. Judgment was thereafter rendered in favor of defendant, dismissing the complaint with costs, from which this appeal was taken.

J. E. Wildish, for the appellants.

For the respondent there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Geo. Lines,* of counsel, and oral argument by *Mr. Lines.*

KERWIN, J. 1. It is claimed by respondent that the complaint is not sufficient for want of proper description of the land in suit, and that from the description, together with the evidence adduced on the trial, it is impossible to determine the south boundary of the strip described. The south boundary is designated as the north boundary of August Becker's land. The exact location of such boundary was in issue, and was claimed by appellants to be the line of the rail fence. The line of the rail fence was established on the trial, and found by the court to be a line ten feet south at the west end and eighteen feet south at the east end of the north line of Becker's tract according to courses and distances in deed from Severn to Becker. The proof settled definitely the exact location of the strip in suit, and the court found in its first finding the land in question to be "a strip of land extending from Richards street on the west to Lake Michigan on the east, said strip being about ten feet wide at the western end and eighteen feet wide at the eastern end, and lying between the fence built by the defendant in the year 1901 and a line south of said fence, on which line formerly stood a rail fence, and thereafter a board fence was built by August Loennecker and August Becker in or about the year 1875, and which said last-mentioned or southerly line is hereinafter called the 'old fence line.'" The fence on this "old fence line" existed in April,

1867, when the deed from Severn to Loennecker was executed, and which called for the Becker land as the south boundary of the Loennecker land, although the deed from Severn to Becker was not executed until October, 1867. The Becker tract and the Loennecker tract having been occupied by the respective owners up to this fence continuously from 1867 for upwards of twenty years, it is probable that the boundary referred to in the Loennecker deed was this fence line. *Nys v. Biemeret,* 44 Wis. 104. However, whether there was any uncertainty in the deed as to the boundary between the tracts, there is no uncertainty after trial and the findings of the court as to the exact location of the land described in the complaint, nor can there be any difficulty in putting the appellants in possession. The object of a definite description is for the purpose of enlightening the defendant as to the particular land claimed and to furnish information sufficient to enable the sheriff to put the plaintiff in possession. *Johnson v. Nevill,* 65 N. C. 677. However particular a description may be, it often requires evidence outside of the written description to enable the sheriff to apply such description to the parcel of land intended, and for this purpose he may satisfy himself of the identity of the land by witnesses or on the representations of the plaintiff (Sedgwick & W. Trial of Title to Land, § 459), the important question being that the sheriff be able to put plaintiff in possession of the land in suit. We think the description of the land in the complaint and finding is sufficient. The only point of confusion concerning the description is the south boundary of the Loennecker tract. This boundary is established as the line of the rail fence, and the strip of land of which the respondent took possession, and which this suit was brought to recover, is definitely fixed in the finding, the southerly line thereof being located as the old fence line. A description is sufficient if, by the aid of a competent surveyor and persons knowing the monuments and boundaries mentioned in the complaint,

the land can be found. *Ayers v. Reidel,* 84 Wis. 276, 54 N. W. 588. There will be no difficulty in locating the land mentioned in the complaint and finding in this action with such aid.

2. It is undisputed that by the courses and distances in the deeds from the common grantor, Severn, to Loennecker and Becker, respectively, in 1867, there remained a strip of land about twenty-five feet wide between the two tracts; but, following the calls in deed to Loennecker for the south boundary as the Becker land, the north boundary of the Becker tract becomes the south boundary of the Loennecker tract. The line between the two tracts at the time of the conveyance to Loennecker was indicated by the rail fence, which was built prior to 1867. The parties occupied their respective lands on each side of this fence from 1867 to 1875, when they built a new fence upon the line of this rail fence, each building one half thereof, and thereafter continued to use and occupy their respective tracts up to this division fence. This use and occupation was continued by the respective parties and those claiming under them to 1891 uninterruptedly, and probably down to the time respondent took possession in 1901. The construction of the new fence in 1875 on the line of the old rail fence by the occupants on both sides shows that they must have then recognized this line as the division line, and very strongly tends to show that they so recognized it from the time of the execution of their respective deeds in 1867, and that the call in the Loennecker deed for Becker's land as the south boundary referred to this rail fence as the boundary. Moreover, the deed to Loennecker, some months before the deed to Becker, which gives the south boundary as Becker's land, must be deemed to refer to the rail fence then existing upon what was obviously understood to be the division line between the Becker and Loennecker tracts, and which thereafter continued to be recognized as the division line for a period of upwards of twenty years. Besides, the rail fence

appears to be the division line most consistent with the conveyances to both parties, since the line given by courses and distances in deed to Becker brings the boundary line between his land and Loennecker's about twenty-five feet south of the line given by courses and distances in the Loennecker deed, while the Loennecker deed calls for the Becker land as the south boundary. The north line of the Becker tract according to courses and distances given in deed is about twenty-five feet south of the south line of the Loennecker tract as given by courses and distances in deed to Loennecker, while the deed to Becker calls for "a point, a corner of August Loennecker's land; thence by the same east twenty-five and eighty-hundredths (25.80) chains to low-water mark of Lake Michigan," as north boundary, so that, by courses and distances given in both deeds, the boundary line is left uncertain. In this condition of the description the rail fence existing at the time of the execution of the deeds, and afterwards recognized as the division fence, was doubtless regarded as the south boundary of the Loennecker tract by the parties at the time of the execution of deed to Loennecker. *Ayers v. Reidel,* 84 Wis. 276, 54 N. W. 588; *Nys v. Biemeret,* 44 Wis. 104; *Madison v. Mayers,* 97 Wis. 399, 73 N. W. 43; *Marsh v. Mitchell,* 25 Wis. 706. But whatever may have been the south boundary as given by the deed to Loennecker, it is considered that possession and occupancy of the land by the parties on both sides of the division line of the old rail fence uninterruptedly and without dispute for more than twenty years prior to 1901, when respondent took possession, establishes right and title in Loennecker and those claiming under him to the line of the old rail fence. The new fence built in 1875 continued as the division fence until 1894, when it practically went out of existence by decay, only posts or parts of posts remaining thereafter. Aside from the existence of the old fence in 1867, when the deeds were made, and the building of the new fence in 1875 as the division line, and the acquies-

cence by all parties interested in the respective tracts thereafter in such line as the division line to 1891 and later, we also have the evidence of witnesses that the Loenneckêr tract was occupied and cultivated by Loennecker and those claiming under him to this division fence from 1868 or 1869, continuously and uninterruptedly, to 1891 and later. The occupation and cultivation of the Loennecker tract up to this fence is undisputed from 1875 to 1891, but it is claimed there is no evidence of use and occupation prior to 1875. From a careful examination of the record we are convinced that there is ample evidence, practically undisputed, that for twenty years prior to 1891 the Loenneckers used and occupied, under claim of right, uninterruptedly and without objection, the land described in the complaint. Upon well-settled principles, this use and occupation established the fact of adverse possession and a perfect title to the land in suit. *Wilkins v. Nicolai,* 99 Wis. 182, 74 N. W. 103; *Nelson v. Jacobs,* 99 Wis. 547, 75 N. W. 406; *Wollman v. Ruehle,* 104 Wis. 603, 80 N. W. 919; *Bishop v. Bleyer,* 105 Wis. 332, 81 N. W. 413; *Batz v. Woerpel,* 113 Wis. 442, 89 N. W. 516; *Illinois S. Co. v. Bilot,* 109 Wis. 418, 84 N. W. 855, 85 N. W. 402. A perfect title having been acquired by adverse possession prior to 1891, it is unnecessary to consider the argument of respondent's counsel that the continuity of adverse possession was interrupted in 1891.

3. It is further claimed by respondent that even if it be conceded that adverse possession was acquired by the Loenneckers prior to the sale to Gether in 1891, and that the recording of the Glen Owen plat did not amount to a recognition of Stanhope's title, still the appellants are not entitled to recover, because Mrs. Loennecker's title to the strip in question passed to Gether by the sale of 1891, which was consummated by deed given in 1892, and was not reconveyed to Mrs. Loennecker. It is undisputed that the Glen Owen plat did not extend to the south line of the Loennecker tract, be-

cause, standing upon the description by courses and distances in deeds from Severn to Loennecker and Becker, respectively, the south line of Glen Owen plat would be about twenty-five feet north of the north line of the Becker tract, leaving a strip of about twenty-five feet between the south line of Glen Owen plat as recorded and the north line of the Becker tract as described by courses and distances in deed from Severn to Becker. There is no evidence whatever of any title in either Stanhope or Becker to this strip, although, when Stanhope recorded his plat in January, 1892, he allowed it to lap over this twenty-five-foot strip, making the north line thereof the south line of Glen Owen plat. Prior to this the Loenneckers had acquired a perfect title to this strip by adverse possession, and also to the strip in suit, the south line of which was the old line fence. It is probably true that title and possession to this strip passed by deed from Johanna Loennecker to Gether in 1892, and that after this conveyance Johanna Loennecker occupied as tenant of Gether. But it is also clear that the deed from Gether to Johanna Loennecker in 1895 conveyed title up to the old fence line. The deed, while it referred to the fact that the Loennecker property, or part of it, had been platted, distinctly gave the Becker property as the south boundary, and, the boundary between the Loennecker tract and the Becker tract having been settled and established by adverse possession prior to that time, there can be no doubt but that the call in the deed for the Becker land as the south boundary conveyed all the interest of Gether to the old fence line. And it further appears that the Loenneckers, after this conveyance from Gether, took possession and continued to occupy up to the old fence line until 1901, when respondent built his fence, so there can be no doubt but that the deed from Gether to Johanna Loennecker not only conveyed the strip in question, but it was so understood by the parties. The title and possession of Johanna Loennecker passed to appellants, and they were the owners and entitled to

possession at the time of the entry by the respondent. It follows, therefore, that the judgment of the court below should be reversed.

By the Court.—The judgment of the court below is reversed, and the cause remanded with directions to enter judgment for appellants in accordance with this opinion.

THE STATE EX REL. LEISK and others, Appellants, vs. THE COMMON COUNCIL OF THE CITY OF WAUWATOSA and others, Respondents.

February 23—March 14, 1905.

Street railways: Extension of existing system: Ordinances: Submission to vote of electors.

An ordinance granting the right to extend an existing street railway line or system upon other streets and highways in the city is not, if the term of such franchise is limited to expire at the same time as that of the existing franchise of which it becomes a part, subject to the provisions of sec. 1, ch. 387, Laws of 1903, in respect to submission of ordinances to a direct vote of the electors.

APPEAL from a judgment of the circuit court for Milwaukee county: GEO. W. BURNELL, Judge. *Affirmed.*

On October 6, 1903, a petition purporting to be signed by 350 citizens, voters, and taxpayers of the city of Wauwatosa was presented to the common council of that city, praying them to submit to a direct vote of all the voters of that city, as prescribed by ch. 387, Laws of 1903, the ordinance which had been adopted by said common council on August 4, 1903, granting a certain franchise to the defendant *Milwaukee Light, Heat & Traction Company.* After reference of the same to the judiciary committee and city attorney, and report thereon from them, the common council denied the petition.

Thereupon, and on November 12, 1903, the relators filed their petition for a writ of *mandamus* to compel such submission. To the alternative writ of *mandamus* issued thereon the common council and the other defendants made return, which was traversed by the reply of the relators. The issue thus joined having been tried, the court, at the close thereof, found as matters of fact, in effect:

(1) That on August 4, 1903, the city of Wauwatosa was, and at all times therein mentioned had been, a municipality duly organized and existing under and pursuant to the laws of Wisconsin, and had been a city comprising within its boundaries the same territory which from 1892 to its incorporation as the city of Wauwatosa in 1897 had been a village corporation under the name of the village of Wauwatosa, and that prior to its said incorporation as a village the territory within the boundaries of said village, and thereafter within the boundaries of said city, had formed part of the territory of the town of Wauwatosa.

(2) That the relators at all the times mentioned in their petition were citizens, voters, and taxpayers of the said city, as alleged in said petition.

(3) That the *Milwaukee Light, Heat & Traction Company,* subsequent to its incorporation in 1896, and particularly on August 4, 1903, was and had been a street railway corporation duly organized and existing under the laws of Wisconsin.

(4) That on and continuously for a period of several years prior to August 4, 1903, there was and had been constructed and in operation in the said city a street railway on and along lines—one known as the north or Pabst avenue (sometimes also called Walnut street) line, which during all of said times was and had been constructed and operated on and along Pabst avenue, Third avenue, and North Main street to a point near the West Main street bridge crossing the Menominee river in said city, and another spoken of as the south

or Wells street line, which during all of said times was and had been constructed on and along Wells street, Fifty-ninth street, Motor avenue, thence to West Main street at a point near the westerly end of the West Main street bridge crossing the Menominee river, thence along West Main and Chestnut streets to the west boundary of said city; and that the said Wells and Walnut street lines at all of said times constituted the only street railway constructed or operated in said city.

(5) That August 4, 1903, and for several years prior thereto, the said railways operated on the aforesaid lines and streets in said city were owned by the defendant *Milwaukee Light, Heat & Traction Company,* and during all of said times, and on August 4, 1903, the said street railways—being all the street railways then constructed or operated in the city of Wauwatosa—were operated under a single management from the same power plants; and during all of said times, and on August 4, 1903, all the street railways existed, constituted, and were operated as one system of street railways in said city, with transfer privileges given, accepted, and used, by means of which passengers were transported from any street-crossing point on any portion of said lines to any other street-crossing point on any other portion of said lines within said city for a single fare, and under franchise granted and consented to by the municipal authorities having jurisdiction for the granting of or consenting to such privileges in the territory which on August 4, 1903, was comprised within the boundaries of said city; and that all the said franchise rights and privileges under which said street railway system was owned, existed, and operated on August 4, 1903, prior to and at the time of the passage of said ordinance of that date were by the express terms thereof limited to expire on May 11, 1941.

(6) That August 4, 1903, the city of Wauwatosa, by an ordinance of its common council, granted to the *Milwaukee Light, Heat & Traction Company* the right, permission, and

authority to extend its existing line and system in the city of Wauwatosa upon certain streets and highways in said city, named in said ordinance, upon the terms and conditions in said ordinance mentioned, and to operate thereon in connection with and as a part of its existing line and system its street railway until May 11, 1941; and that said ordinance granting to said street railway company the right to extend its said line and system in said city was duly passed by said common council August 4, 1903, and approved by the defendant *Emerson D. Hoyt*, as mayor of said city, on the same day, and thereafter published as required by law in the official paper of said city, and on September 1, 1903, the same was accepted in writing by the *Milwaukee Light, Heat & Traction Company*.

(7) That September 23, 1903, a number of the qualified voters of said city equal to twenty per cent. and more of the total number of votes cast at the last preceding election in said city demanded that the ordinance so passed on August 4, 1903, be submitted to a direct vote of all the voters of said city; that the papers containing the demand for such direct vote were filed with the city clerk on September 23, 1903; and that each signer of said paper wrote thereon his occupation and residence after his signature, and that the genuineness of each signature was affirmed by the affidavit of a qualified voter of said city.

(8) That October 6, 1903, said petition and demand was by the city clerk presented to the common council at a regular meeting thereof, and at said council meeting duly and regularly referred to the judiciary committee of said common council and the city attorney of said city for investigation and report; that October 20, 1903, at a regular meeting of said common council, the said judiciary committee and city attorney reported the same back with a report and recommendation to said common council to the effect that said common council was without authority of law to submit the said ordi-

nance to a direct vote of all the voters of said city; that the common council adopted the report so made and as recommended by its said committee, and refused to submit said franchise to a direct vote of the voters in said city, and thereafter at all times refused to so submit the same.

(9) That the said franchise ordinance so passed August 4, 1903, was an ordinance of the city of Wauwatosa authorizing the extension of an existing line and system of street railway in said city upon streets and highways therein, with the term of such extension expiring by the express terms thereof at the same time as the franchise of which it is a part, to wit, May 11, 1941.

And as conclusions of law the court found, in effect: (1) That the said ordinance was and is within the exception contained in sec. 1, ch. 387, Laws of 1903, being an ordinance granting an extension in said city of an existing line and system of street railways upon streets or highways therein, with the term of such extension expiring at the same time as the franchise of which it is a part; and that said chapter does not require or authorize the submission of the said ordinance to a direct vote of the voters of said city. (2) That the relators are not entitled to have the said ordinance so granted by the common council of the city submitted to a direct vote of all the voters of the city, and that the common council of the city was not required and was not authorized by law to submit said franchise extension ordinance to a direct vote of all the voters of the city. (3) That the relators herein are not entitled to the peremptory writ of *mandamus* prayed for in this action, and that said peremptory writ of *mandamus* prayed for in this action should be denied and the petition of the relators therefor be dismissed, with costs of the action to be taxed against the relators, and that said defendants should have execution therefor.

From the judgment entered in accordance with such findings the relators appeal.

For the appellants there was a brief by *Turner, Pease & Turner,* and oral argument by *L. S. Pease.* They contended, *inter alia,* that the words "upon any street or highway," in sec. 1, ch. 387, Laws of 1903, are words of limitation, and the exception in the law is restricted to an extension upon any street or highway upon which there is an existing line or system. To sustain the contention that the ordinance in this case need not be submitted to the electors, the words "upon any street or highway" must be eliminated and the words "extension of" be changed to the words "addition to;" and even then the language would not be broad enough to include those streets which, as in this case, are not even connected with the streets on which there is an existing line.

Charles B. Perry, for the respondents the mayor and common council.

For the respondent *Milwaukee Light, Heat & Traction Company* there was a separate brief by *Miller, Noyes & Miller,* and oral argument by *Geo. H. Noyes.*

CASSODAY, C. J. It is stipulated in writing, and made a part of the record in this case, and that the same "shall be conclusive upon the parties" in this action, that at the time of the application for the passage of the ordinance in question—July 7, 1903—the defendant the "*Milwaukee Light, Heat & Traction Company* was the owner of all street railway franchises and privileges then existing, or which had at any time been granted in the territory contained within the boundaries of the city of Wauwatosa by either the city of Wauwatosa, the village of Wauwatosa, or the town of Wauwatosa; that the said franchise rights and privileges so existing in said city were" a franchise granted by the town board of Wauwatosa May 11, 1891, to expire May 11, 1941, a franchise granted by the village of Wauwatosa July 2, 1896, to expire May 11, 1941, and a franchise granted by the city of Wauwatosa September 5, 1899, to expire May 11, 1941.

"(3) That, notwithstanding any finding asked by appellant and refused by the trial court, no question of the validity or ownership of the above franchises shall be raised by the appellant on the argument on this appeal, and that as to the question herein stipulated the findings of the trial court are to be considered as verities. (4) That no question shall be raised by appellants on this appeal in their brief or oral argument . . . excepting the right to a writ of *mandamus* depending on the question of whether or not the franchise ordinance of . . . common council of August 4, 1903, . . . is or is not an extension of any existing line or system within the meaning of the provision contained in the last part of sec. 1, ch. 387, Laws of 1903." The section of the statute thus mentioned, and upon the construction of which it is thus conceded the case must turn, declares that:

"From and after the passage of this act no ordinance for granting either a street railroad . . . franchise, or for the extension of the life of any such existing franchise, shall be operative in any city in this state until after sixty days from the date of its passage, and if in any such case and during said period of sixty days a number of the qualified voters, equal to twenty per cent. of the total number of votes cast at the last preceding election in such city, shall demand that the ordinance be submitted to a direct vote of all the voters therein, such ordinance shall not be valid or operative until it shall have been so submitted and approved by a majority of those having voted upon it. The provisions of this section *shall not apply to the extension of any existing line or system* upon any street or highway, *if the term of such extension expires at the same time as the franchise of which it is a part.*" Sec. 1, ch. 387, Laws of 1903.

As indicated in the statement of facts, all street railways constructed or operated in the city of Wauwatosa August 4, 1903, were owned by the defendant *Milwaukee Light, Heat & Traction Company,* and "were operated under a single management from the same power plants, and . . . constituted and were operated as one system of street railways in said

city, with transfer privileges given, accepted, and used, by means of which passengers were transported from any street-crossing point on any portion of said lines to any other street-crossing point on any other portion of said lines within said city for a single fare." Moreover, the ordinance of August 4, 1903, by its terms, is to expire at the same time as the other franchises mentioned—May 11, 1941. The question recurs whether, in the language of the stipulation, that ordinance "is or is not an extension of any existing line or system within the meaning of the provision contained in the last part of sec. 1, ch. 387, Laws of 1903."

The section first provides, in effect, that "no ordinance for *granting* either a street railroad . . . franchise, or for the extension of the life of any such existing franchise, shall be operative in any city" until "submitted to a direct vote," as prescribed therein, if demanded. This was manifestly intended to cover two classes of cases—one where there is an original grant of such franchise, and the other where there is the extension of the life of an existing franchise, and hence applies both to the original grant of such franchise and to the extension of the life of an existing franchise. Obviously, the ordinance in question is not the original grant of such franchise, and hence that may be dismissed from consideration. Nor is it the extension of the life of an existing franchise. The life of all such existing franchises, by their express terms, is to expire May 11, 1941, and the ordinance in question, by its express terms, is to expire at the same time. The last part of the section expressly declares that "if," as in the case at bar, "the term of such extension expires at the same time as the franchise of which it is a part," then "the provisions of the section" requiring "that the ordinance be submitted to a direct vote," as therein prescribed, "shall not apply to the extension of any existing line or system upon any street or highway." The life of a franchise only continues during the period of its existence. The section con-

templates the extension of any existing line or system of street railways upon other streets and highways without any extension of the life of an existing franchise. In other words, the act contemplates an extension of such system in space as well as time. Since the ordinance in question was not the original grant of a franchise, nor an extension of the life of an existing franchise, it is obvious that it did not come within the provision of the section requiring the submission of the same "to a direct vote" as therein prescribed. On the contrary, that ordinance merely extended the lines and system of street railroad then existing in the city of Wauwatosa upon the other streets and highways of that city, as mentioned in the record, and hence came within the last clause of the section. In other words, the lines and system of street railways existing in the city when the ordinance was adopted were thereby extended to other streets and highways as therein mentioned. Such is the plain meaning of the statute in question. This makes it unnecessary to consider other questions discussed by counsel.

By the Court.—The judgment of the circuit court is affirmed.

SILVERMAN, Administratrix, Appellant, vs. FIDELITY AND CASUALTY COMPANY OF NEW YORK, Respondent.

February 23—March 14, 1905.

Appeal: Effect of dismissal: Direction for further proceedings: County courts.

1. In the absence of statutory provisions to the contrary the dismissal of an appeal removes the case from the appellate court and places the parties in the same condition as they were before the appeal was taken.

2. Sec. 4037, Stats. 1898, does not authorize the circuit court, upon dismissing an appeal from the county court, to remand the cause for further proceedings in accordance with the findings of the circuit court, especially where such proceedings would necessitate the vacation of the judgment appealed from.

APPEAL from an order and from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

It appears by the record that one Edward Silverman, deceased, was agent of the respondent company at Milwaukee during his lifetime, and that he died insolvent March 31, 1901, owing the respondent, for premiums theretofore collected by him, $1,076.95; that on Saturday, March 30, 1901, he gave to the respondent's general agent his check on the First National Bank, Milwaukee, for this sum, and that he had on deposit in said bank at that time a larger amount than the amount of the check, but that the check was not presented until Monday, April 1st, when payment thereof was refused on account of the drawer's death; that subsequently the appellant, who had been appointed administratrix of the estate of the deceased, drew out all of the moneys in the bank, and also collected premiums upon policies which had been solicited by the deceased and issued by the respondent, and that of the sum so collected by her $381.42 was owing to the respondent; that the respondent presented a written claim to the county court, charging that these sums in the hands of the administratrix were trust funds and praying that the same be turned over by the respondent to it; that this claim was tried in the county court upon a stipulated statement of facts, and that court held that the sums were not trust funds, and rendered judgment in favor of the respondent against the estate for said sums as general claims against the estate.

From this judgment the respondent appealed to the circuit court, and the case was tried in that court without a jury, upon oral testimony, but no bill of exceptions has been set-

tled. The circuit court, after finding the facts in the case, concluded that the amounts aforesaid in the hands of the administratrix were trust funds and belonged to the respondent; that the county court had no jurisdiction to order the administratrix to turn over the said trust funds, and that the circuit court upon appeal obtained no jurisdiction to make such an order; that the county court had no jurisdiction to allow said sums as general claims; and hence that the appeal should be dismissed and the case remanded to the county court for further proceedings in accordance with the findings. Judgment to this effect was rendered by the circuit court, and immediately thereafter the appellant moved to modify the judgment by striking out that part thereof which remanded the case to the county court for further proceedings in accordance with the findings and entering simply a judgment of dismissal with costs. This motion was denied, and the administratrix appeals from the order denying the motion as well as from that part of the judgment which remands the cause to the county court for further proceedings.

For the appellant there were briefs by *Joseph B. Doe,* attorney, and *Hoyt, Doe, Umbreit & Olwell,* of counsel, and oral argument by *Joseph B. Doe.*

For the respondent there was a brief by *Kronshage & McGovern,* and oral argument by *Theodore Kronshage, Jr.*

WINSLOW, J. The circuit court dismissed the appeal and remanded the cause "for further proceedings in accordance with the findings." This is practically a direction to the county court to vacate the judgment appealed from, for it is plain that no proceedings in accordance with the findings could be taken which did not include the vacation of that judgment. The sole question presented on this appeal is whether that part of the judgment remanding the cause "for further proceedings in accordance with the findings" can be sustained. This question must be answered in the negative,

both on reason and authority. There can be no doubt that, in the absence, at least, of statutory provisions to the contrary, the dismissal of an appeal removes the case from the appellate court and places the parties in the same condition as they were before the appeal was taken. *Falvey v. O'Brien*, 17 Wis. 188; Elliott, Appellate Procedure, § 535. Sec. 4037, Stats. 1898, regulating and prescribing the relief to be administered by the appellate court in case of an appeal from the county court, does not affect the question here presented. It will not be necessary to do more in this court than to reverse the order denying the motion and also to reverse the part of the judgment appealed from. This will leave the judgment below simply a judgment of dismissal.

By the Court.—The order appealed from and that part of the judgment appealed from are reversed.

STOLTMAN, Plaintiff in error, vs. THE TOWN OF LAKE, Defendant in error.

February 23—March 14, 1905.

Justices' courts in Milwaukee county: Jurisdiction: Violation of municipal ordinances: Orders of board of health: "Fines:" Appeal.

1. The jurisdiction which, by sec. 5, ch. 218, Laws of 1899, as amended by sec. 1, ch. 70, Laws of 1901, and by ch. 388, Laws of 1903, is preserved to justices of the peace in Milwaukee county outside of the city of Milwaukee as to violations of ordinances of their respective municipalities, extends only to those violations for which the prosecution is to be by civil action in the name of the municipality, under sec. 3294, Stats. 1898; and offenses which are misdemeanors as defined in said sec. 3294, punishable by fine or imprisonment or both in an action in the name of the state, are not within such jurisdiction.
2. Thus, the violation of an ordinance or regulation of the board of health of a town in Milwaukee county, punishable only

under sec. 4608, Stats. 1898, by imprisonment or by fine, is not within the jurisdiction of a justice of the peace of such town.

3. The word "fine," as used in sec. 3294, Stats. 1898, does not include those forfeitures, sometimes called fines, imposed by municipal corporations for violating their ordinances.

4. An appeal from the judgment of a justice of the peace who had no jurisdiction of the subject matter confers no jurisdiction upon the appellate court, and it should dismiss the case.

ERROR to review a judgment of the municipal court for Milwaukee county: A. C. BRAZEE, Judge. *Reversed.*

Plaintiff in error was convicted of having violated an ordinance or resolution of the board of health of the town of *Lake* prohibiting the bringing of any garbage, offal, night soil, refuse, dead dogs, dead horses, or the dead carcasses of other animals, except as may be designated for human food, for the purposes of burying, deposit, disposal, consumption, or any other purpose, into the town of *Lake,* and providing that any violation thereof should be punishable under sec. 4608, Stats. 1898. The proceedings at first were before a justice of the peace of the town of *Lake* in Milwaukee county, Wisconsin.

The judgment of the justice was appealed to the municipal court for Milwaukee county. Upon the hearing there it was shown that the board of health of the town of *Lake* in form adopted the regulation alleged to have been violated, pursuant to sec. 1411, Stats. 1898. It was further shown that plaintiff in error violated said regulation. Thereupon he was in due form convicted, and upon such conviction was sentenced to pay a fine of $5 and costs, and in default thereof to be imprisoned in the house of correction not exceeding thirty days. The sentence was imposed under sec. 4608, Stats. 1898.

For the plaintiff in error the cause was submitted on the brief of *J. M. Clarke.*

For the defendant in error there was a brief by *Boden & Beuscher,* and oral argument by *F. X. Boden.*

MARSHALL, J. Whether the health regulation plaintiff in error was convicted of having violated is valid under the rules laid down in *State ex rel. Adams v. Burdge,* 95 Wis. 390, 70 N. W. 347, we need not determine, since there is another question involved in the appeal, the proper solution of which, it seems, is fatal to the judgment of the municipal court.

It is conceded, as the fact is, that unless the regulation is an ordinance within the meaning of ch. 388, Laws of 1903, the justice usurped authority in exercising jurisdiction in this matter. By sec. 5, ch. 218, Laws of 1899, the jurisdiction of a justice of the peace of Milwaukee county to try and determine criminal actions was taken away and vested in the district court. This is the language in that regard:

"Said district court shall have exclusive jurisdiction . . . to hear, try and determine all charges or offenses arising within said county of Milwaukee, the punishment whereof does not exceed one year's imprisonment in the state prison or county jail or a fine of five hundred dollars, or both such fine and imprisonment; to hear, try and determine all charges for misdemeanors arising within said county, otherwise triable before a justice of the peace."

By sec. 1, ch. 70, Laws of 1901, and ch. 388, Laws of 1903, that was amended by adding these words:

"Nothing herein contained shall be construed to deprive any justice of the peace of any town, or any city or village justice in any incorporated city or village in Milwaukee county, except only the city of Milwaukee, of jurisdiction to hear, try and determine complaints for the violation of any ordinance of any such town, city or village."

Thus it may be seen that the jurisdiction of a justice of the peace of Milwaukee county, outside of the city of Milwaukee, was by legislative construction made certain as to violations of municipal ordinances of his town, city, or village, and the exclusive trial jurisdiction of the district court was likewise made clear as to criminal offenses committed in said county, punishable by imprisonment in the state prison or county jail

not exceeding one year, or by a fine not exceeding $500, or by both such fine and imprisonment.

It seems plain from this that the purpose of the legislature was to vest in the district court exclusive jurisdiction as to all crimes and misdemeanors, so called, required to be prosecuted by action in the name of the state, and to preserve to justices in Milwaukee county, outside of the city of Milwaukee, trial jurisdiction as to mere violations of ordinances in their respective municipalities, which by statute are to be prosecuted as civil actions in the names of such municipalities under sec. 3294, Stats. 1898, which provides that:

"In all cases, not otherwise specially provided for by law, where a forfeiture shall be incurred by any person and the act or omission for which the same is imposed shall not also be a misdemeanor, such forfeiture may be sued for and recovered in a civil action. When such act or omission is punishable by fine and imprisonment or by fine or imprisonment or is specially declared by law to be a misdemeanor it shall be deemed a misdemeanor within the meaning of this chapter. The word forfeiture, as used in this chapter, shall include any penalty, in money or goods, other than a fine."

Thus it will be seen that every offense punishable by fine or imprisonment or both is, at least, a misdemeanor, which concerns the state at large, not specially any municipality. It is not one of those mere local regulations, punishable generally as a mere liability to the particular municipality in which it occurs by a forfeiture recoverable in a civil action. The distinction between the two classes of offenses was very clearly pointed out in *Oshkosh v. Schwartz,* 55 Wis. 483, 13 N. W. 552. That case leaves no room for doubt that an offense, punishable otherwise than by a mere forfeiture recoverable as a civil liability with or without power to enforce the judgment for such recovery by confining the offender till he shall pay such judgment, is a misdemeanor or something worse, and is punishable by an action in the name of the state in the absence of some special authority to the contrary. The

word "fine" as used in sec. 3294 is used in the same sense as the same word in sec. 2, art. X, of the constitution. It does not include those forfeitures, sometimes called fines, imposed by municipal corporations for violating their ordinances.

The regulation in question contains no provision for a penalty for its violation. It is only punishable, if at all, under sec. 4608, Stats. 1898. That provides that "any person who shall wilfully violate," etc., "any order or regulation of any board of health, lawfully made and duly published, shall be punished by imprisonment in the county jail not more than three months or by a fine not exceeding one hundred dollars." Reading that in connection with sec. 3294, it will be seen that such a violation is a misdemeanor punishable as other offenses of that nature in the name of the state, and not one of those liabilities to a municipality which, by legislative construction if that were necessary, was excepted out of the grant of exclusive trial jurisdiction conferred upon the district court of Milwaukee county as to misdemeanors. The language conferring such exclusive jurisdiction does not necessarily, if at all, include violations of mere municipal by-laws, denominated "ordinances." Such violations are not offenses as the term is used in criminal law, but liabilities enforcible by civil actions. Manifestly, it is the latter which are referred to in the legislative construction of the grant to the district court of Milwaukee county of exclusive jurisdiction, not criminal offenses punishable by fine, strictly so called, or imprisonment, or both.

It follows from the foregoing that the justice of the peace was without jurisdiction to try the plaintiff in error. That went to the subject matter, hence the appeal from the judgment of the justice conferred no jurisdiction on the municipal court, and it should have dismissed the cause. *Klaise v. State,* 27 Wis. 462; *Butler v. Wagner,* 35 Wis. 54.

By the Court.—The judgment of the municipal court for Milwaukee county is reversed, and the cause remanded with directions to dismiss the proceedings.

COBB, Respondent, vs. SIMON, Appellant.

February 24—March 14, 1905.

Master and servant: Liability for torts outside scope of employment.

Where a floor walker in a store knew that a customer had not stolen goods, but falsely or by a trick made it appear that she had, and imprisoned and assaulted her in order to extort money from her, his employer is not liable for such acts, they being wholly outside the scope of the employment.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

This record presents a third trial of the same case considered under the same title in 119 Wis. 597, 97 N. W. 276, where the facts are sufficiently set forth. Upon the trial now under consideration there was complete and positive evidence by the plaintiff that she did not steal a bolt of lace and did not have any upon her person; also that, after leaving for the last time the lace counter, the floor walker, Saxe, had fitted onto her a corset, thus involving the lifting of her arms and his knowledge of the impossibility of her having hidden outside of her clothing any such parcel. The jury returned the same verdict as before, except that they assessed compensatory damages at $2,000 and punitory damages at $500. Defendant moved to reverse the answer to the third question finding that the acts of Saxe were done within the scope of his employment. Judgment was entered upon the verdict, from which the defendant appeals.

For the appellant there was a brief by *Kronshage & McGovern,* attorneys, and *Oscar M. Fritz,* of counsel, and oral argument by *Theodore Kronshage, Jr.*

For the respondent there was a brief by *D. T. Phalen,* attorney, and *Simon Gillen* and *E. A. Kehr,* of counsel, and oral argument by *Mr. Gillen.*

DODGE, J. Upon the former trial it was declared that "if the servant knew no merchandise had been stolen, but falsely or by a trick made it appear that the plaintiff had the lace under her arm, and imprisoned and assaulted her in order to extort money from her, the defendant would not be liable for any of his acts, because Saxe had stepped aside from his employment to commit a tort for his own purposes and ends." It was further concluded that, because there was no positive statement from plaintiff or her daughter that the former had not taken and did not have upon her person the bolt of lace produced by Saxe, the jury might have inferred that she did have it, and that Saxe might have so believed, and therefore was not perpetrating a fraudulent tort for his own purpose, but was seeking to promote his employer's interests. The views then expressed are entirely conclusive of the present appeal, for it does now appear by the testimony of both plaintiff and her daughter that no such bolt of lace as that pretended to have been taken from her by Saxe was upon plaintiff's person; also that she had been subjected to such an experiment by Saxe, in fitting a corset upon her, that he must have known that she had nothing of the sort in her possession. This evidence is wholly undisputed, and supplies the certainty as to Saxe's motive in the transaction which was lacking on the former trial. In deference to what we then declared, we must now hold that the evidence conclusively established that Saxe was acting wholly outside the scope of his employment. The court, upon the motion of the defendant, should have changed the answer to the third question from "Yes" to "No." Upon such answer to the third question no judgment could result save one in favor of the defendant.

By the Court.—Judgment reversed, and cause remanded with directions to grant defendant's motion to change from "Yes" to "No" the answer to the third question of the special verdict, and, upon the verdict so changed, to render judgment in favor of the defendant.

GREEK-AMERICAN SPONGE COMPANY, Respondent, vs. RICHARDSON DRUG COMPANY, Appellant.

February 24—March 14, 1905.

Interstate commerce: Sale of goods in original package: Shipment for inspection: Right of foreign corporation not authorized to do business in this state.

1. Interstate commerce conducted by corporations organized within different states stands upon the same footing under the federal constitution as interstate commerce conducted by individuals.
2. A contract for the sale of a lawful article of commerce in its original package while it was an article of interstate commerce is not governed by sec. 1770*b*, Stats. 1898, prescribing conditions upon which foreign corporations may transact business in this state and depriving them in certain cases of the right to recover upon contracts made before compliance with its provisions.
3. By the terms of an agreement for the sale of a bale of sponges by plaintiff, a foreign corporation, to defendant, a domestic corporation, two bales were to be shipped from Chicago to Milwaukee for inspection and defendant was to have the right to choose one or to reject both. The bales were shipped accordingly, with other goods, to plaintiff's agent in Milwaukee, who at defendant's request opened the bales and examined their contents and then, after refastening them as they were before, delivered one to defendant. *Held*, that the goods delivered had not lost their character as articles of interstate commerce, and that the right of plaintiff to enforce payment therefor was not affected by sec. 1770*b*, Stats. 1898.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

This is an action to recover the amount due for goods and merchandise which plaintiff claims to have sold defendant in the month of June, 1903. The cause was tried by the court without a jury. From the facts found by the court it appears: The plaintiff was at the time of the transactions in controversy a foreign corporation organized and existing under the laws of the state of Illinois, and was engaged in the business of

buying and selling sponges at the city of Chicago. It has not filed its articles of association with the secretary of state of Wisconsin, as required by sec. 1770*b*, Stats. 1898, and the acts amendatory thereof. Defendant is a corporation organized under the laws of this state, engaged in the drug business at the city of Milwaukee, Wisconsin.

As to the sale of sponges in question, the following negotiations and dealings took place: E. L. Leser, residing at Milwaukee, as plaintiff's traveling salesman for this and other territory, negotiated with defendant's representative in the early part of June, 1903, to sell it some goods. Defendant informed him, through its president, that it wished to purchase a bale of a certain kind and quality of sponges, which were offered at the regular market price. It was arranged between the parties that plaintiff should select from its stock at Chicago a couple of bales of the specified goods and ship them to Milwaukee for defendant's inspection, and defendant was to have the privilege of accepting one and of rejecting one or both of them. Plaintiff's agent then issued in his own name a written order on plaintiff, at Chicago, for the two bales of sponges, with instructions not to ship, but to hold them for his inspection. About June 24th thereafter, plaintiff, under this order, shipped two bales of these goods, with other goods, to Milwaukee, Wisconsin. These goods were consigned to plaintiff's traveling salesman, by whom they were received and placed in the Plankinton Hotel for defendant's inspection in the bales. When defendant's officers were requested to inspect them at the hotel, they informed plaintiff's agent who had them in charge of their inability to do so, and requested him to select and send the bale of best value to its place of business for examination; if suitable it would keep it, and if not it would send it back. Thereupon plaintiff's agent opened the bales at the hotel, examined the goods, then put back what he had taken out and closed the bales as they were before, and delivered the one selected by him to defend-

ant. He then made out and transmitted to plaintiff another order for the goods so delivered. The goods were received by defendant, the bale opened and examined by soaking out one or two of the sponges, and apparently found to be all right.

Defendant at about this time received a bill or invoice from plaintiff, dated June 24, 1903, specifying the sale and delivery of the goods through its agent (naming him), also the kind, quality, and price of the goods, and the amount due therefor, with the statement: "All claims must be made within three days after receipt of goods." Plaintiff requested payment of the account, and, upon failure of payment, on August 12, 1903, drew on defendant through the bank for the amount by a draft, which was returned unpaid. Upon further request for payment, defendant, without further communication with plaintiff, neglected to do so, but on October 30, 1903, reshipped the bale of the unsold goods to plaintiff, and mailed it a statement giving the invoice of the goods as originally delivered by plaintiff to defendant, deducting therefrom the amount sold, which was the balance due plaintiff. Plaintiff refused to accept this reshipment and return of the property.

The court made the following specific findings: "That the size and quality of sponges can be ascertained by inspection after soaking them out, and defendant could and did ascertain the size and quality of the sponges by an inspection after opening the bale and soaking one or two of them out;" also, "that plaintiff made no warranty nor representation respecting the goods, other than is contained in these findings." The court concluded, as matter of law: (1) That the transaction amounted to a sale of the goods to defendant in the original package as shipped into the state; (2) that the goods, when so sold, were not mingled with, nor had they become a part of, the mass of property within this state; (3) that the plaintiff, up to the time it delivered the goods to defendant, was engaged in interstate commerce, and that plaintiff there-

fore had the right to make this sale as an incident to this transaction; (4) that in making this contract it did not violate sec. 1770*b*, Stats. 1898, and amendments thereof, because the transaction is exempt from the provisions of this section, as one pertaining to interstate commerce; (5) that plaintiff was entitled to judgment for the amount claimed under the sale.

This is an appeal from the judgment.

For the appellant there was a brief by *Edgar L. Wood*, and oral argument by *L. R. Worden*.

C. T. Hickox, for the respondent.

SIEBECKER, J. The appellant urges exceptions to the court's finding to the effect that the bales of goods were in the custody of plaintiff's agent at the hotel in Milwaukee for the purpose only of giving defendant an opportunity to inspect them, to determine whether they were to be accepted or rejected by it under the contract of sale, and the further finding that the bale of goods, when delivered to defendant, was in the original package as transported from Chicago to Milwaukee. The findings are excepted to upon the ground that they are inferences of fact not justifiable from the evidence adduced. Plaintiff's agent, Mr. Leser, is the only witness testifying on this subject. His evidence is that the two bales of goods, consigned in his name, were shipped to Milwaukee by plaintiff for the purpose of affording defendant the opportunity of inspecting them under the terms of the agreement theretofore made between the parties; that he received the two bales, with other goods, at Milwaukee, and transferred them to a hotel for the purpose of having them inspected by their customers for acceptance or rejection; and that if accepted he would deliver them to the purchasers; if rejected, they would be returned to the plaintiff at Chicago. It appears that defendant's officers were unable to make the inspection, but directed plaintiff's agent to select the bale of best value of the two sent

for their inspection, deliver it at their place of business, and if it was satisfactory it would be retained; otherwise it would be returned. The evidence on this point of the transaction is that the agent cut the cords fastening the bales, for the purpose of examining the contents, which he did by taking out some sponges. He then put back all he had so taken out, refastened the bales as they were before opening them, and then selected the bale in question for defendant and delivered it at their place of business. This evidence clearly supports the finding of the trial court on this issue. It is to the effect that the sponges were shipped to Milwaukee in bales for the purpose of inspection by defendant, and that they were delivered and transferred to defendant in the original package as transported from Chicago to Milwaukee. We find no tenable grounds for the exceptions urged to these points.

It is further argued, upon the facts as found by the court, that these goods at the time of their delivery to defendant had lost their character as an article of interstate commerce by becoming mingled with and incorporated into the mass of property in this state. To sustain this contention it must appear that at some time after the goods arrived at Milwaukee and before they were delivered to defendant they were so dealt with as to exclude the inference that plaintiff held them for the purpose of consummating the transaction under the terms of the sale, and that this was part of the process of importing them from Chicago. It is apparent that the arrangement made between the parties at the first interview between plaintiff's agent and defendant's officer amounts to an agreement for a purchase and sale of a bale of sponges, subject to the condition that defendant, after inspecting the goods offered under the agreement, might reject them if not satisfactory. Whatever was done with the goods at Milwaukee before their actual delivery was necessary for the purpose of completing the transfer under the conditions of the agreement of sale, pursuant to which they were shipped. The opening of the bales

so as to permit an inspection of their contents for the purposes declared can in no sense be construed a dealing with them as merchandise in the market, whereby they were taken out of the process of transportation and thus became a part of the mass of property in the state. These acts were proper steps in the delivery of the property to the purchaser and therefore essential to the performance of the contract. The reasonable inference from these events is that the property was in no way diverted from the original purpose of the shipment, namely, to fulfil the agreement of the parties.

The question presented is, Does the transaction come within the protection of the federal constitution regarding interstate commerce? The fact that this transaction is one wherein the parties are corporations organized within different states can in no way affect the question, since the same protection is extended to commerce conducted by corporations as that by individuals. As stated in *Paul v. Virginia,* 8 Wall. 168, at the time this power was conferred upon Congress a large part of the world's commerce was carried on by well-known and noted corporations, and "this state of facts forbids the supposition that it was intended, in the grant of power to Congress, to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on. It is general, and includes alike commerce by individuals, partnerships, associations, and corporations." The facts before us show a course of dealing wherein a foreign corporation, as a dealer, has undertaken to enforce payment for goods which were transported to this state, delivered, and accepted by a purchaser, under an agreement, made in this state, providing that when the goods were delivered to the purchaser they might be rejected if not satisfactory. It is unquestioned in this case that respondent was engaged in interstate commerce while transporting the goods from Chicago, Illinois, to Milwaukee, Wisconsin; but it is urged that subsequent to

their arrival in Milwaukee and before their delivery to defendant they ceased to be an article of interstate commerce coming under the commerce clause of the federal constitution, and therefore the provisions of sec. 1770*b*, Stats. 1898, applied to the transaction had concerning them in Milwaukee, which resulted in a consummation of the sale, and that this renders the contract of sale nonenforcible by the plaintiff.

The extent of the power delegated to Congress to regulate commerce between the states, and to what extent transactions are deemed to be a step in such commerce, have been repeatedly considered by the federal supreme court. In *Brown v. Maryland,* 12 Wheat. 419, it was declared that the extent of this power "is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior," and that "sale is the object of importation, and is an essential ingredient of that intercourse of which the importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce." In the case of *Schollenberger v. Pennsylvania,* 171 U. S. 1, 18 Sup. Ct. 757, the court reviews the decisions upon this subject, and reiterates its adhesion to the rules enunciated in *Brown v. Maryland* and many subsequent cases, and declares that "in the absence of Congressional legislation, therefore, the right to import a lawful article of commerce from one state to another continues until a sale in the original package in which the article was introduced into the state." Among additional authorities on the subject are the following: *Robbins v. Shelby Co.* 120 U. S. 489, 7 Sup. Ct. 592; *Bowman v. C. & N. W. R. Co.* 125 U. S. 465, 8 Sup. Ct. 689, 1062; *Leisy v. Hardin,* 135 U. S. 100, 10 Sup. Ct. 681; *Lyng v. Michigan,* 135 U. S. 161, 10 Sup. Ct. 725; *Stockard v. Morgan,* 185 U. S. 27, 22 Sup. Ct. 576; *Caldwell v. North Carolina,* 187 U. S. 622, 23 Sup. Ct. 229; *Norfolk & W. R. Co. v. Sims,*

191 U. S. 441, 24 Sup. Ct. 151; *American Exp. Co. v. Iowa,* 196 U. S. 133, 25 Sup. Ct. 182; *Swift & Co. v. U. S.* 196 U. S. 375, 25 Sup. Ct. 276.

Within the rule of these adjudications it must be held that the contract of sale sought to be enforced by the respondent pertained to the sale of a lawful article of commerce in its original package while it was an article of interstate commerce. Under these circumstances the contract is exempted from the provisions of sec. 1770*b*, and plaintiff is not precluded from enforcing it, though, as a foreign corporation, it has failed to comply with the requirements of this law. The right of the state to prescribe the conditions upon which foreign corporations may carry on business within the state is undisputed and stands approved by the courts. When, however, such regulation imposes conditions which restrict them in their right, as foreign corporations, to make contracts pertaining to commerce between the states, then such legislation is an invasion of their constitutional right, under the provision which confers upon Congress the power to regulate such commerce, and such legislation is invalid to that extent. *Cooper Mfg. Co. v. Ferguson,* 113 U. S. 727, 5 Sup. Ct. 739; *Fritts v. Palmer,* 132 U. S. 282, 10 Sup. Ct. 93; *Crutcher v. Kentucky,* 141 U. S. 47, 11 Sup. Ct. 851.

These considerations dispose of the questions involved, and lead to the conclusion that the trial court properly awarded judgment in respondent's favor.

By the Court.—Judgment affirmed.

MADLER, Respondent, vs. POZORSKI, Appellant.

February 24—March 14, 1905.

Agency to sell land: Sale by subagent: Agreement to divide profits: Inconsistent positions: Evidence.

1. Where plaintiff, having authority to offer certain land for sale and to submit bids therefor to the owner, agreed with defendant that if the latter should find a purchaser the profits should be equally divided, but no exclusive agency was transferred to defendant, it was not inconsistent with such contract for plaintiff to endeavor to make a sale to defendant's customer.
2. Such an agreement by plaintiff was not inconsistent with his duty to the owner of the land, if there was no fraud, deception, or unfair dealing in his relations with such owner.
3. Unfair dealing by defendant with the owner, in which plaintiff did not participate, would not affect plaintiff's right to recover his share of the profits made by defendant on a sale of the land.
4. Rejection of evidence offered to impeach immaterial testimony elicited from the opposite party on cross-examination, is not a material error.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

Plaintiff and defendant lived in Milwaukee, and were engaged in buying and selling real estate. Robert C. Thielman, who owned certain property in Milwaukee, lived at Tomahawk, Wisconsin. Plaintiff at the time in question was acting as agent of Thielman for the purpose of collecting rents from this property, with authority to attend to necessary repairs and alterations, and with the further understanding that Thielman desired to sell the property and in case plaintiff could obtain an offer therefor it should be submitted to Thielman for approval. Pursuant to this understanding plaintiff had placed signs upon the property bearing the words "For Sale" and his name and address. He had also, prior to July 15, 1903, the time when defendant first appeared upon the scene, advertised the property for sale in several newspapers.

On or about the 15th of July, 1903, defendant went to plaintiff's office and said he thought he could help plaintiff sell the Thielman property; and it was agreed verbally that if defendant found a purchaser the profits would be divided between plaintiff and defendant. Defendant at the same time asked permission to remove plaintiff's signs from the property, which was granted, and the signs were afterwards removed. About a week later defendant went to plaintiff's office and told plaintiff he had sold the property for $7,500, and plaintiff said he did not think Thielman would take any such figure as that for it. Defendant requested plaintiff to see Thielman in relation to this offer, which plaintiff agreed to do; but owing to Thielman's absence and illness plaintiff had no communication whatsoever with him for about three weeks, when he wrote Thielman, stating that he thought he had a purchaser for the property and asking for the lowest figure he would accept. The same day he received a letter from Thielman stating that the property had been sold to defendant. This was the first intimation plaintiff had of the sale and of the fact that defendant had any dealings whatever direct with Thielman. On the same day, August 7, 1903, plaintiff wrote to Thielman, stating: "I had expected that you would advise me before accepting any proposition from any one, but if you made a good deal all well and good." A few days later Thielman went to plaintiff's office in Milwaukee with defendant, where the deal was closed. As the papers were about to pass, plaintiff called Thielman's attention to the fact that he had expended $75 or $80 for repairs upon plumbing in the property and requested payment. Defendant had the deed run to his wife, with $1 consideration; and on the following day Mrs. Pozorski conveyed the property to one Warzala, the purchaser, for $1.

This action was brought to recover $425 and interest from August 21, 1903—one half of $850, profits alleged to have been realized by defendant on the sale to Warzala. The ac-

tion was tried before the court and a jury, and a verdict of $438.50 found for plaintiff. Motion for new trial denied, judgment on the verdict, and appeal.

J. C. Officer, attorney, and *Joseph B. Doe,* of counsel, for the appellant.

For the respondent there was a brief by *Quarles, Spence & Quarles,* and oral argument by *William C. Quarles.*

KERWIN, J. 1. It is claimed by counsel for appellant that the court erred in refusing to admit testimony as to plaintiff's attempt to get hold of defendant's customer. The contract set up in the complaint was that the defendant should have the right to offer the property for sale and make a sale of the same, and that the profits should be equally divided, but it does not appear that the exclusive agency was transferred to defendant. The evidence offered tended to show that plaintiff was endeavoring to make a sale, and this was not inconsistent with his contract with defendant. Therefore exclusion of such evidence was not reversible error. It appears that evidence was offered by defendant for the purpose of impeaching the testimony of plaintiff and one Kern, who testified on cross-examination to the effect that they did not solicit defendant's customer. The testimony as to whether or not they did so solicit being immaterial, evidence to impeach it was likewise immaterial, and the exclusion of it not prejudicial error.

2. Under the second and fourth assignments of error, to the effect that the court erred in denying defendant's motions for the direction of a verdict, to change the verdict, and for judgment, and for a new trial, and in granting plaintiff's motion for judgment, it is contended that plaintiff could not act as the agent of, and receive pay from, Thielman and defendant; but it does not appear that plaintiff's relations with Thielman were in any way inconsistent with his contract with defendant. Plaintiff was endeavoring to obtain a bid for the property for Thielman, and agreed with defendant that if he

should obtain an acceptable offer plaintiff would divide profits with him on the sale. There is no evidence whatever of any attempt on the part of plaintiff to take advantage of his principal, or conceal from him any material fact concerning the sale. On the contrary, it appears that he was at all times acting in the interest of his principal in the proposed sale. Whether defendant was guilty of unfair dealing with Thielman can in no manner affect plaintiff, if he was not a party to it. It not appearing that plaintiff was guilty of any fraud, deception, or unfair dealing in his relations with Thielman, it is unnecessary to consider the effect of such conduct upon the plaintiff's right to recover.

3. Appellant further assigns as error that the question of fraud and deception on the part of the agents against their principal was ignored. From the view we have taken of the case it does not appear to us that there was any question of fraud to submit to the jury.

By the Court.—The judgment of the court below is affirmed.

KUENZLI, Administrator, vs. BURNHAM, imp., Respondent: CHASE and another, imp., Appellants.

February 24—March 14, 1905.

Appeal: Reversal: Mandate directing judgment: Power of trial court.

Under sec. 3071, Stats. 1898, where the supreme court reversed the judgment of the trial court and remanded the cause "with directions to enter judgment dismissing the complaint," the trial court had no power to enter any different judgment in the action, even though the parties made no objection or voluntarily submitted, as prescribed in sec. 2788, a matter in controversy arising out of an order relative to the rents and profits of the land in suit, made prior to the judgment appealed from.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

This case was here upon a former appeal. 119 Wis. 509, 516, 97 N. W. 176. That appeal was from a judgment setting aside a deed of conveyance from the original plaintiff, Clinton Burnham (since deceased), to his wife, the defendant *Anna Burnham,* and canceling a mortgage on the property described in the deed, executed February 6, 1901, and the mortgage executed May 21, 1901. That judgment was reversed by this court, and the cause was remanded with directions to enter judgment dismissing the complaint as of October 21, 1903, when the same was submitted, and which was before the death of Clinton Burnham. The action was commenced May 27, 1901. It now appears that pursuant to an order of the trial court made July 29, 1901, the husband was allowed to collect the rents and profits of the lands in controversy upon giving a bond in the sum of $20,000, executed by himself as principal, and *Clifford Chase* and the *Pacific Surety Company* as sureties, conditioned to account for such rents and profits and pay over a certain amount thereof to the wife, *Anna,* as therein prescribed. After the *remittitur* from this court was filed in the trial court, and on April 12, 1904, an order was made therein referring the cause to a circuit court commissioner to hear, try, and determine the amount of such rents and profits remaining due and unpaid to the widow, *Anna,* on the bond. He found the amount to be $945.82, which the court, on motion, reduced to $922.12, September 13, 1904. From the judgment entered thereon for that amount as damages and $108.25 costs in favor of the widow, *Anna,* and against the plaintiff, as administrator of the estate of Clinton Burnham, deceased, and *Clifford Chase* and the *Pacific Surety Company,* as such sureties, the sureties appeal.

For the appellants there was a brief by *Quarles, Spence & Quarles,* attorneys, and *William C. Quarles,* of counsel, and oral argument by *William C. Quarles.*

For the respondent there was a brief by *Turner, Pease & Turner,* and oral argument by *W. J. Turner.*

CASSODAY, C. J. The liability of Clinton Burnham to his wife, *Anna,* for rents and profits was not in issue nor adjudicated on the former appeal; much less was the liability of the sureties on the bond mentioned. After providing in a general way for the mandate from this court, the statute declares that:

"In all cases the supreme court shall remit its judgment or decision to the court from which the appeal or writ of error was taken, *to be enforced accordingly;* and if from a judgment, *final judgment* shall thereupon be entered in the court below, *in accordance therewith,* except where otherwise ordered." Sec. 3071, Stats. 1898.

In strict accordance with that statute, this court, on the former appeal, reversed the judgment of the trial court, and remanded the cause "with directions to enter judgment dismissing the complaint." *Burnham v. Burnham,* 119 Wis. 509, 516, 97 N. W. 176, 179. Such being the mandate, it became the duty of the trial court, in obedience thereto and to the statute quoted, to enter in that court "final judgment" "in accordance" with such mandate. In fact it had no power or authority to enter any different judgment in this action than thus prescribed. This has, in effect, been repeatedly declared by this court. *Patten P. Co. v. Green Bay & M. C. Co.* 93 Wis. 283, 291, 66 N. W. 601; *Crowns v. Forest L. Co.* 100 Wis. 554, 76 N. W. 613; *Ean v. C., M. & St. P. R. Co.* 101 Wis. 170, 76 N. W. 329; *Bloor v. Smith,* 119 Wis. 163, 96 N. W. 544.

Counsel seek to justify the judgment entered on the ground that no objection was taken to the practice pursued nor the proceedings before the referee. It may be that the sureties, as well as the estate of the deceased, were willing to investigate as to the true amount due to *Anna* on the bond, with a view to settlement without further litigation. Whatever may have been the motive, it is quite evident that there was no voluntary submission of the controversy, as prescribed by the statute. Sec. 2788, Stats. 1898. Even had there been such

submission it could not have authorized judgment in this action contrary to the mandate of this court.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with direction to obey the mandate of this court on the former appeal, and "enter judgment dismissing the complaint."

GRAND LODGE OF WISCONSIN OF THE ORDER OF HERMANN'S SONS vs. LEMKE, Appellant, and BURKHARDT and another, Respondents.

February 24—March 14, 1905.

Life insurance: Benefit associations: Who may be beneficiaries: "Survivors."

1. The grant of power, in ch. 101, Laws of 1899, to any member of a benefit association to name as his beneficiary any person designated by the laws of the association, is a limitation upon the right.
2. Where the laws of a benefit association limit beneficiary rights to "survivors" of the member, that term does not include one who was neither a relative of the deceased, nor a member of his household, nor connected with him by marriage.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This is an action of interpleader, brought by a fraternal benefit association against rival claimants of the amount due upon a benefit certificate issued by the association upon the life of one John Burkhardt. The action was tried by the court, and there is no bill of exceptions. The court found that the plaintiff was a fraternal benefit corporation organized and licensed under the laws of Wisconsin, and that John Burkhardt, now deceased, became a member thereof September 29,

1888, and received from it a benefit certificate in the sum of $900, payable to his wife, subject to a change of beneficiary by written declaration; that John Burkhardt, April 22, 1902, made a valid change of beneficiaries by written declaration, and therein designated *John Burkhardt, Jr.*, and *Anna Krischer*, his children, as beneficiaries; that the constitution, laws, and regulations of the plaintiff corporation provided that the mortuary fund should be paid to "survivors" of a member. (The provisions of plaintiff's constitution and regulations on this subject are fully set forth in the findings, but, as they may be found substantially stated in the case of *Koerts v. Grand Lodge*, 119 Wis. 520, 97 N. W. 163, it is not necessary to insert them here.)

The court further found that February 2, 1903, John Burkhardt filed an application for a second change of beneficiaries, by which he designated *Emilie Lemke* as his sole beneficiary, fully complying with all the requirements of the by-laws upon his part as to the making of the change; that John Burkhardt died March 3, 1903, at the age of seventy-eight years, being then a member in good standing of the plaintiff corporation, and that due proofs of his death were made; that *Emilie Lemke* was not related to the deceased by affinity or consanguinity, but that deceased had lived in her house from January 24 to March 2, 1903, and she had nursed and attended him, prepared his meals, and provided medical attendance, and made him comfortable until he died, and by agreement with him had paid the dues and assessments upon his certificate while he lived at her house, as well as two payments after his death.

The court concluded upon these facts that *Emilie Lemke* was not a survivor, and that her designation as beneficiary was void, and that the moneys due upon the certificate were the property of *John Burkhardt, Jr.*, and *Anna Krischer*. Judgment was rendered in accordance with these findings, and *Emilie Lemke* appeals.

F. J. Walthers and *John H. Paul,* for the appellant.

For the respondents there was a brief by *Lenicheck, Fairchild & Boesel,* and oral argument by *F. T. Boesel.*

WINSLOW, J. The plaintiff is a fraternal beneficiary corporation providing insurance for its members on the assessment plan. Neither the pleadings nor findings state the date of its incorporation, but, as the benefit certificate in question was issued in September, 1888, it seems that it must have been organized as an insurance corporation under that clause of sec. 1771, R. S. 1878, which authorizes the formation of corporations "for the mutual support of the members, their families or kindred, in case of sickness, misfortune, poverty or death, or for contributing to the burial of the dead." By the fundamental laws of the corporation it confined the payment of the death benefit upon its certificates to the "survivors" of the member whose life was insured. By ch. 418, Laws of 1891, such corporations, both domestic and foreign, were regulated as to the manner of their formation and mode of operation, and this act was amended and recodified by ch. 175, Laws of 1895, which last-named act contained a section authorizing the insured member of such a society to name as his beneficiary "any person having an insurable interest in his life or to make his insurance payable to his estate." Sec. 3, Id. This act was substantially incorporated into the Statutes of 1898 by secs. 1955*a* to 1955*m,* inclusive, the section last above quoted being sec. 1955*c*. By ch. 101, Laws of 1899, sec. 1955*c* was amended so that any member was authorized to name as his beneficiary "any person or persons designated by the laws of such society, . . . or, if the laws thereof permit, his insurance may be made payable to his estate." Thus it will be readily seen that in February, 1903, when the deceased member in question attempted to designate the appellant as his beneficiary, the laws of the state distinctly provided that the insured might name as his beneficiary any person desig-

nated by the laws of the society; and this clause, being a grant of power, is clearly a limitation upon the right.

The main question presented, therefore, is whether the appellant is included within the term "survivors," to which class beneficiary rights are limited by the laws of the society. If she is not so included, then there was no power on the part of the insured, nor of the corporation itself, to constitute her a beneficiary. *Groth v. Central Verein,* 95 Wis. 140, 70 N. W. 80. She was not a relative in any way, but had nursed and cared for the insured for several weeks prior to his death.

The question as to who may be legally considered a "survivor" was somewhat considered in the case of Koerts against this same corporation, 119 Wis. 520, 97 N. W. 163, and the conclusion there reached was that the term does not include one who "was neither a relative of the deceased, nor a member of his household, nor connected with him by marriage." We have seen no reason to change that conclusion by reason of any argument addressed to us in the present case, and we conclude, therefore, that the judgment in the present case was rightly rendered.

By the Court.—Judgment affirmed.

KENNEY and another, Plaintiffs in error, vs. THE STATE, Defendant in error.

February 24—March 14, 1905.

Manslaughter: Killing in heat of passion, without design, etc.: Involuntary killing while committing assault: Preconcerted joint assault.

The evidence in this case is *held* sufficient to sustain the conviction of the defendants of manslaughter in the third degree:—of one under either sec. 4354 or sec. 4355, Stats. 1898, and of the other under sec. 4355.

ERROR to review a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

E. C. Alvord, for the plaintiffs in error.

For the defendant in error there was a brief by the *Attorney General* and *Walter D. Corrigan,* assistant attorney general, and oral argument by *Mr. Corrigan.*

WINSLOW, J. One Thomas McCarty was shot and killed on the evening of the 26th of March, 1904, at a saloon in the town of Mason, Bayfield county. The plaintiffs in error (hereinafter called the defendants) were charged with his murder, and upon trial the jury returned a verdict against both defendants of manslaughter in the third degree, and the case comes to this court upon writ of error.

There are no claims of error in the rulings upon evidence or in the charge of the court, but the broad claim is made that there was no evidence upon which a verdict of manslaughter in the third degree could be properly based, especially as to the defendant *McComb.* There are many facts which were undisputed. It appears that the defendants were employed in the woods, and came to the village of Mason on the morning of March 26th to attend a caucus held there on that day, and that they were together most of the day. One Frank Taylor, an acquaintance of both defendants, was also in town that day, and met the defendants several times. There had previously been personal difficulties between *Kenney* and Taylor, and *McComb* knew the fact. *Kenney* procured a loaded revolver early in the day, and carried it with him, and this fact *McComb* also knew. The defendants spent most of the day gravitating from saloon to saloon, and as evening approached they were both considerably intoxicated. Taylor had been pursuing zealously the same line of conduct and with like results. At about 9 o'clock in the evening all three went to the saloon of one Hogan, which had been closed for the night, and woke up the

bartender, who opened the door and let them in, and the business of the day was resumed with renewed vigor. At this time McCarty was with them. A row took place between Taylor and *McComb,* in the course of which Taylor slapped *McComb,* but the row went no further, and *Kenney* and *McComb* left the saloon for a time, but soon returned. After their return there was more drinking, when the row which terminated McCarty's life started. As to this row the accounts of the witnesses materially differ. According to the stories of Taylor and the bartender, Scott, *McComb* began to abuse or "pick on" Taylor, who resented it and started to punish *McComb.* While Taylor was engaged in this, *Kenney* pulled out his revolver and leveled it at Taylor and threatened to shoot him. Taylor attempted to knock the revolver to one side, and as he did so it went off, the shot entering the brain of McCarty and inflicting a fatal wound. According to *Kenney's* story, Taylor attacked *McComb* and struck and kicked him, and he (*Kenney*) told the bartender to stop the row, when Taylor turned and attacked him (*Kenney*) and knocked him down, whereupon he drew his revolver, not intending to shoot, but using it as a club, and in the scuffle Taylor grabbed his hand with the revolver in it and the revolver was accidentally discharged. The fact that McCarty was shot was apparently not noticed for a little time, and the affray continued without interruption, and *Kenney* and *McComb* thoroughly pounded Taylor. *McComb's* story of the affray was substantially similar to *Kenney's.*

The theory of the state was that *Kenney* and *McComb* had prepared themselves for the affray during the day, and that it was their intention to provoke a row and kill Taylor, and there was considerable testimony which would justify such a finding, but, as the jury found otherwise, the only question is whether, on any reasonable theory of the evidence, a finding of manslaughter in the third degree can be justified.

Sec. 4354, Stats. 1898, provides that:

"Any person who shall kill another in the heat of passion without a design to effect death, by a dangerous weapon, in any case except such wherein the killing of another is herein declared to be justifiable or excusable, shall be deemed guilty of manslaughter in the third degree."

Sec. 4355 provides that:

"The involuntary killing of a human being by the act, procurement or culpable negligence of another, while such other person is engaged in the commission of a trespass or other injury to private rights or property or engaged in an attempt to commit such injury, shall be deemed manslaughter in the third degree."

As to the defendant *Kenney* there would seem to be no serious question but that the jury might reasonably find a verdict of manslaughter in the third degree under either section. If they believed (as they were entitled to believe) *Kenney's* own story of the brutal and unprovoked attack made upon him by Taylor, there was certainly ample ground for concluding that when he drew his pistol he was in the heat of passion; and if they further believed (as he testified) that he had no design to effect death, but still believed, as they might, that he intended to shoot, and that the shooting was not justifiable or excusable, all the elements of the crime required by the first of the above-quoted sections would be present. On the other hand, if they believed (as they might) that *Kenney* was unlawfully assaulting Taylor, and, while using his pistol for that purpose, it was negligently and involuntarily discharged, the crime would be complete under the second of said sections.

As to the defendant *McComb,* it may be conceded that it would be difficult to find any reasonable theory on which he could be convicted as a principal under sec. 4354, but there is no serious difficulty under sec. 4355. There was considerable evidence tending to show that *Kenney* and *McComb* had ar-

ranged during the day to make a joint assault on Taylor in revenge for Taylor's past indignities to *Kenney,* and that the pistol was procured as a part of the plan. If such was the case, and the jury found that *Kenney* and *McComb* were acting jointly in pursuance of this arrangement, and in the course of this preconcerted joint assault the weapon was involuntarily discharged by *Kenney,* both would be equally responsible for the result of the shooting, though the pistol was handled by *Kenney* alone.

We conclude that the judgment was right as to both defendants.

By the Court.—Judgment affirmed.

IN RE MILWAUKEE SOUTHERN RAILWAY COMPANY.

October 24, 1904—April 5, 1905.

Railroads: Condemnation of lands: Due incorporation, how proven: Termini and length of road: Survey: Intention to construct: Dismissal of proceedings as to part of lands: Crossing streets, etc.: Taking park land.

1. The fact that a railroad company is duly incorporated, required by sec. 1846, Stats. 1898, to be stated in a petition for condemnation of lands, is conclusively shown, under sec. 4181, by production of its patent of incorporation issued by the state.
2. The requirement of sec. 1820, Stats. 1898, that the articles of organization of a railroad corporation shall state "the places from and to which such railroad is to be constructed or maintained and operated," does not refer necessarily to places within the state, but is complied with by the designation of termini without the state.
3. The requirement of said sec. 1820 that the length of the proposed railroad be stated, refers to the length of the road between the termini, and is not limited to the portion within the state.
4. The requirement of sec. 1846, Stats. 1898, that it shall appear that the petitioner "has surveyed its route over the land sought to

be acquired for its main line and has actually staked out the center line of its proposed road over the grounds desired for such main line," refers only to that part of the main line covering the land sought to be acquired in the specific proceeding.

5. The fact that condemnation proceedings must be dismissed as to some of the lands described because of insufficiency of notice to the owners does not deprive the court of jurisdiction to proceed as to the lands whose owners were given proper notice, although such lands do not constitute a continuous part of the line of the proposed road.

6. The fact that a railroad corporation intends in good faith to construct the road authorized by its charter is conclusively shown, in proceedings for the condemnation of land, by the production of its patent of incorporation issued by the state. DODGE and WINSLOW, JJ., dissent.

7. The power given by subd. 5, sec. 1828, Stats. 1898, to a railroad corporation to construct its tracks across, along, or upon streets or highways is in no way superseded or taken away by the power given to a city "to regulate and prohibit the use of locomotive engines within the city and to control the location of railroad tracks."

8. Under our statutes a railroad corporation has no right to condemn and take for its uses any part of a public park if without such taking it can efficiently and beneficially exercise the power of locating and building its road between the termini thereof.

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

This is an appeal from an order appointing commissioners in a proceeding to acquire real estate for railway purposes. The application states that the petitioner is a duly incorporated railroad corporation under the laws of this state; that it was organized to construct, maintain, and operate a railroad for public use from a point in the city of Milwaukee, Wisconsin, thence in a southerly and southwesterly direction to a point on the boundary between the states of Wisconsin and Illinois, thence in a like direction as above stated to East St. Louis, in the state of Illinois; that it is intended in good faith to construct the railroad authorized by the charter and articles of incorporation; that of the lands designated it re-

quires the parts described for a public use, stating the names of the owners and occupants of such lands. The petition prays an order prescribing the notice to be given and the time and place of hearing; that the court determine whether petitioner is entitled to take the lands sought to be acquired for such public use; and that commissioners be appointed to ascertain and appraise the compensation to be made.

The appellants, the city of *Milwaukee,* the *International Harvester Company, Theron Higby,* and *Michael J. Canar,* all appeared separately, and answered, denying all the material allegations of the petition, and alleging that part of the land of petitioner's proposed route sought to be condemned is one of the public parks of the city of *Milwaukee,* and that the petitioner had not obtained the consent of the city of *Milwaukee* to cross any of the city streets with the proposed railroad. It appears that petitioner had made application to the common council of the city of *Milwaukee* for such consent, but that the application had not received final action at the time these proceedings were instituted.

Upon the hearing it appeared that the required notice of hearing had not been given to some of the owners of the lots covered by the application, and the proceedings were discontinued as to such pieces of land, without prejudice to the right of petitioner to institute other proceedings to condemn these pieces of land for the purpose of building this railroad.

The court found: (1) That petitioner is a railroad corporation, duly incorporated and existing under the laws of the state. (2) That the real estate covered by the proceedings is necessary to construct and operate this railroad. (3) That petitioner intends in good faith to construct and operate the railroad authorized by petitioner's articles of incorporation and patent issued over and upon the lands covered by this proceeding. (4) That the strip of Mitchell Park adjoining the track of the Chicago, Milwaukee & St. Paul Railway Company is unimproved land, poorly adapted for park purposes, and is

necessary to enable petitioner to construct its railroad as located, and that the taking of such strip for this purpose will not materially or substantially damage the park as a whole, or impair its usefulness. (5) That petitioner has surveyed its route over the lands in question for its main line, and has actually staked out the center line of the proposed railroad over this land; that the land specified to be taken for depot purposes, station buildings, grounds, and yards is required and necessary, and that petitioner intends in good faith to use them for such purposes; that the route of this railroad has been located by petitioner's board of directors upon the line staked out over the land covered by the proceedings, and that this real estate is required for the purposes of constructing and operating petitioner's proposed railroad. (6) That petitioner intends in good faith to institute independent condemnation proceedings to acquire the real estate originally intended to be included in the proceedings, but as to which the proceedings were dismissed without prejudice. (7) And that petitioner has complied with the requirements of the statutes, and has done all things necessary to entitle it to take the real estate covered by the proceedings and sought to be acquired for the purposes stated.

Upon such findings the court made an order declaring petitioner a duly incorporated railroad under the laws of this state, and that the real estate in question is necessarily required by it to construct, maintain, and operate the proposed railroad; and appointing commissioners to ascertain and appraise the compensation to be paid to the owners of the real estate so to be taken, fixing the time and place of their first meeting, and prescribing what notice should be given by them to the real-estate owners. This is an appeal from such order.

For the appellant the city of *Milwaukee* the cause was submitted on the brief of *Carl Runge,* city attorney.

For the appellants *Higby* and *Canar* there were briefs by *Timlin & Glicksman,* and oral argument by *W. H. Timlin.*

For the appellant the *International Harvester Company* there was a brief by *Miller, Noyes & Miller,* and oral argument by *Geo. H. Noyes.*

For the respondent there was a brief by *J. C. Kerwin* and *John F. Burke,* attorneys, and *Henry C. Wood* and *Colin C. H. Fyffe,* of counsel, and oral argument by *Mr. Kerwin.* They contended, *inter alia,* that the petitioner has a right to condemn a right of way through Mitchell Park or along one side of it, the taking of which would not in any way interfere with the uses of the whole property for park purposes. The state, through the legislature, may from time to time, as necessity demands, exercise such right of eminent domain over any property within its borders, even though such property had been formerly dedicated to public use. 1 Lewis, Eminent Domain (2d ed.) §§ 3, 244–246; sec. 3, art. IX, Const.; *N. Y., H. & N. R. Co. v. B., H. & E. R. Co.* 36 Conn. 196, 198; *Smith v. Gould,* 59 Wis. 631, 643. Where, as here, a railroad company is given power by its charter to locate its terminus and does so locate it at a point which makes it necessary to cross property formerly dedicated to public use, the right to condemn such property is an essential element of the grant. *Providence & W. R. Co. v. Norwich & W. R. Co.* 138 Mass. 277; *Mobile & G. R. Co. v. Alabama M. R. Co.* 87 Ala. 501. The implied right to take property formerly dedicated to public use arises generally where a necessity exists, and where such second public use will not be destructive of the first. *Smith v. Gould,* 59 Wis. 631; 1 Lewis, Eminent Domain (2d ed.) § 276; *Mobile & G. R. Co. v. Alabama M. R. Co.* 87 Ala. 501; *Providence & W. R. Co. v. Norwich & W. R. Co.* 138 Mass. 277; *N. Y., H. & N. R. Co. v. B., H. & E. R. Co.* 36 Conn. 196, 198; *Central B. Corp. v. Lowell,* 4 Gray, 474; *Springfield v. Conn. River R. Co.* 4 Cush. 63; *Boston v. Brookline,* 156 Mass. 172, 30 N. E. 611. See, also, *Chicago, R. I. & P. R. Co. v. Lake,* 71 Ill. 333; *Easthampton v. Hampshire Co. Comm'rs,* 154 Mass. 424, 28

N. E. 298; *Rominger v. Simmons,* 88 Ind. 453; *Pittsburgh J. R. Co. v. Allegheny V. R. Co.* 146 Pa. St. 297; *South & North Ala. R. Co. v. Highland Ave. & B. R. Co.* 119 Ala. 105; *St. Louis, H. & K. C. R. Co. v. Hannibal U. D. Co.* 125 Mo. 82; *Scranton G. & W. Co. v. Northern C. & I. Co.* 192 Pa. St. 80; 1 Lewis, Eminent Domain (2d ed.) pp. 664–666; *Butte, A. & P. R. Co. v. Montana U. R. Co.* 16 Mont. 504, 41 Pac. 232; *Cincinnati, S. & C. R. Co. v. Belle Centre,* 48 Ohio St. 273, 27 N. E. 464; *Peoria, P. & J. R. Co. v. Peoria & S. R. Co.* 66 Ill. 174; *Denver P. & I. Co. v. Denver & R. G. R. Co.* 30 Colo. 204, 69 Pac. 568. The property of Mitchell Park sought to be taken is not in actual use for park purposes and therefore may be acquired the same as if owned by an individual. *C. & N. W. R. Co. v. C. & E. R. Co.* 112 Ill. 589; *Butte, A. & P. R. Co. v. Montana U. R. Co.* 16 Mont. 504, 41 Pac. 232; *Mobile & G. R. Co. v. Alabama M. R. Co.* 87 Ala. 501; *N. Y., H. & N. R. Co. v. B., H. & E. R. Co.* 36 Conn. 196; *N. Y. C. & H. R. R. Co. v. Met. G. Co.* 63 N. Y. 326; *Chicago W. D. R. Co. v. Met. W. S. El. R. Co.* 152 Ill. 519; *Youghiogheny B. Co. v. Pittsburg & C. R. Co.* 201 Pa. St. 457.

The following opinion was filed January 31, 1905:

SIEBECKER, J. The statute providing for the acquisition of real estate by railroad corporations for the purposes of their organization prescribes (sec. 1846, Stats. 1898) what shall be stated in the petition for the appointment of commissioners of appraisal. Any person whose estate or interest is affected by the proceedings may show cause against granting the prayer of the petition. After a hearing of the petition the court or judge shall determine "whether the railroad corporation is entitled to take the whole or any part of the land sought to be acquired, and if no sufficient cause is shown against granting the prayer of the petition shall make an order appointing" commissioners "to ascertain and appraise

the compensation to be made to the owners or persons interested in the real estate determined necessary to be taken . . . for the purposes of the corporation." It is urged that no determination should have been made in this proceeding holding that petitioner is entitled to take any of the lands sought to be acquired for railroad uses, upon the ground that it appeared that petitioner is not a duly incorporated railroad corporation under the laws of the state. Upon the hearing petitioner produced its patent, properly executed and issued by the state of Wisconsin, granting to the persons named therein full authority to exercise the powers and privileges of a railroad corporation in accordance with the articles of incorporation and the laws of the state. Under sec. 4181, Stats. 1898, any such patent of incorporation "shall be received as conclusive evidence of the existence of the corporation mentioned therein . . . in all cases where such facts are collaterally involved, and as presumptive evidence thereof and of the facts therein stated in all other cases." It is suggested that the patent and its conclusive effect cannot incumber this inquiry in this proceeding, because the statute under which petitioner proceeds requires it to allege and prove its due incorporation. True, such are the statutory requirements. These requirements are, however, met by proper allegation of incorporation and the production of the patent in proof thereof. We can perceive no difference in the conclusive effect of the patent as evidence of such fact in this proceeding and such effect in a suit between this corporation and any other adverse party. The rule is well established in this state that the state alone can inquire into and object to the unauthorized exercise of corporate powers. *Allen v. Clausen,* 114 Wis. 244, 90 N. W. 181, and cases cited. The right of the state to confer corporate powers and privileges upon petitioner is unquestioned, and the inquiry whether they are regularly and properly conferred cannot arise in this proceeding, since the production

of the patent establishes this fact and precludes all further inquiry as to its corporate existence.

It is also claimed that the proof fails to show the required places from and to which such railroad is to be constructed or maintained and operated, in that but one place within this state is named; the other being within the state of Illinois. We cannot accede to appellants' construction of this statute that this requirement applies to the termini within this state. The language of the statute plainly directs that the places from and to which the road is to be constructed shall be given, but there is nothing in the provision indicating that it is limited to places within this state; nor is there any valid objection to a requirement that the termini of the road shall be given, even though the termini are without the state. This corporation may exercise all its rights and privileges in any other state, subject to the laws thereof, under sec. 1830, Stats. 1898, and under such powers may propose to construct a line of railroad reaching beyond the boundaries of this state. We think the termini of the road are properly designated, and sufficiently definite to meet the calls of the statute. *St. Louis, H. & K. C. R. Co. v. Hannibal U. D. Co.* 125 Mo. 82, 28 S. W. 483.

The requirement that the length of the proposed railroad be given manifestly refers to the length of the road between the termini, and is not limited to the portion of the road within the boundaries of this state. It is sufficient if the portion of the proposed road within the state be designated by naming each county in this state through or into which it is designed to be located and built.

It must appear that the petitioner "has surveyed its route over the land sought to be acquired for its main line, and has actually staked out the center line of the proposed road over the ground desired for such main line," and "that the route of said road has been located by its board of directors upon

the line so staked out." It is argued that this provision demands as a condition for acquiring the right to condemn a portion of the land over which the proposed road is located that the whole route between the termini must have been surveyed. The words in their natural application to the circumstances of a condemnation proceeding indicate clearly and definitely that a survey of the route refers to that part of the main line covering the lands sought to be acquired in this specific proceeding. This construction harmonizes with the requirement of staking out the center line of the route over these lands and its location thereon by its board of directors.

It is also alleged that the court erred in appointing commissioners, in view of the fact that the proceedings had been dismissed as to a part of the lands described on account of insufficiency of notice to the real-estate owners, thus leaving the line of the road included in the proceedings without continuity. This action of the court seems proper. There is nothing in the statutes indicating that only a continuous part of the main line of the proposed road can be included in a proceeding to condemn the right of way. The method of procedure to acquire such lands in its practical application suggests the necessity of applying for condemnation of parts of the right of way separately, and there is nothing in the exercise of this right, or in the terms of the statute granting it, in conflict therewith. Furthermore, we discover no valid grounds for the contention that the court had lost jurisdiction to proceed as to those parcels wherein proper notice was given, though dismissal was required as to some of the lands for want of such notice to those interested. The proceeding is not to be construed too strictly. A liberal rule should prevail so long as the rights of the parties and the protection of their property interests are secured.

The court's finding that the petitioner intended in good faith to construct the road authorized by its charter is vigor-

ously assailed as not sustained by the record. Whether this question is open to inquiry under the statute is in dispute between the parties. It is suggested by the petitioner that it cannot be litigated in this proceeding because the issuance of a patent conclusively presumes this fact to be established as a condition precedent to granting it the corporate powers to build the proposed railroad. In opposition to this it is urged that the statute expressly requires this fact to be stated in the petition, and it is therefore an issue to be litigated upon the hearing. The requirement that this fact shall be alleged in the petition is not in itself a sufficient reason for deeming it an issuable one, for the statute also requires that the fact of petitioner's incorporation shall be alleged; yet upon the production of the patent the inquiry as to that fact, *for the purposes of this proceeding, is foreclosed.* So it has been held by this court that, though the persons interested may show cause against the granting of the prayer for condemnation of a certain right of way selected by the company, the question whether lands so selected for its track as needed are necessary for building its road in that place instead of some other convenient place is not an issuable fact, but one committed entirely to the discretion of the company. *Ford v. C. & N. W. R. Co.* 14 Wis. 609.

We are unable to perceive any necessary or beneficial object to be attained by permitting each landowner to litigate this question and inquire into the intent of the corporation of carrying out its declared purpose, when the state has issued its patent and bestowed the grant of power to build, operate, and maintain this railroad. The grant of such important powers and privileges must be upon the grounds that the state is satisfied to bestow them upon the particular persons under the established facts and circumstances, in the belief that the incorporators will fulfil the purposes of the grant, and that they have complied with all the necessary conditions precedent to becoming vested therewith. The provision of the statute

requiring that an affidavit by at least three persons named therein shall be annexed to the articles of incorporation before filing with the secretary of state, stating "that it is intended in good faith to construct or maintain and operate the railroad therein mentioned," significantly indicates that the legislature intended that the fact of intention in good faith to construct the road authorized by the charter is thereby established as a fact, and as a necessary condition precedent to the issuance of a patent of incorporation. This requirement negatives the construction that each landowner whose real estate is sought to be taken has the right to litigate it. It also seems that such a procedure would render the proceeding inoperative and ineffectual as a method of acquiring real estate for a right of way, because of the liability of conflicting and inconsistent determinations of this issue in the various courts having jurisdiction of the matter. Such an intent should not be imputed to the legislature if another reasonable one can be read out of the statutes. We are led to the conclusion that the fact that petitioner intended in good faith to construct the road authorized by its charter must be held as conclusively established by the production of its patent. Our attention has been directed to the varying conclusions of the courts upon this question in different jurisdictions, but we believe this result preserves the statutory objects and purposes, and protects the rights of all persons coming within its operation.

The city of *Milwaukee* contends that petitioner cannot proceed to condemn land within the city without first having obtained the consent of the city to construct its railroad over and across the city streets and thoroughfares. By sec. 1828, Stats. 1898 (subd. 5), a railroad corporation is given the power to construct its railroad tracks across, along, or upon streets or highways which its route shall intersect or touch in the manner therein prescribed. The right thus conferred is in no way superseded or taken away by the power given to the city "to regulate and prohibit the use of locomotive en-

gines within the city and to control the location of railroad tracks." The powers thus conferred upon the city and that conferred upon the railroads must be exercised by them respectively within the limits evidently intended by the legislature. It is apparent that the railroad companies are given the absolute right to construct their lines across, along, or upon a city street, and this cannot be interfered with by the city; but the city may within its police power regulate the location of railroad tracks in such manner as the situation may reasonably require, but such right is not paramount to the power given to railroads to use the streets as prescribed. *Wis. Tel. Co. v. Oshkosh,* 62 Wis. 32, 21 N. W. 828; 2 Lewis, Eminent Domain, § 395; *In re N. Y. C. & H. R. R. Co.* 77 N. Y. 248.

It is also contended by the appellant city of *Milwaukee* that petitioner has no power to take any part of the land devoted to the purposes of a public park, and the trial court erred in holding that petitioner had established its right to take a strip off Mitchell Park for its route. The legislative right, under the right of eminent domain, to take property already subjected to a public use, and to apply it to a public use different from that to which it is devoted, is well recognized by legislation authorizing the taking of public highways, canals, railway property, and lands devoted to other public purposes. The right to exercise such a power must rest on express legislative grant, or it must arise by necessary implication from the powers and privileges so granted, or it must appear that the rights granted, when applied to the conditions and circumstances covered by it, cannot be beneficially exercised without the taking of property already devoted to a public use. The power of petitioner to condemn property for railroad purposes is a general grant to build the road between the termini designated in its articles of incorporation, and contains no express provision authorizing the taking of any property already devoted to public purposes, except in so far

as the legislature has provided that certain property devoted to public uses, such as public highways, state lands, and other railroad property, may be taken. Nowhere is authority given to take any part of public parks. The question then arises whether petitioner is authorized to take such property by necessary implication. The result of adjudications in determining what rights are conferred by legislation of this nature is concisely stated in *Winona & St. P. R. Co. v. Watertown*, 4 S. Dak. 323, 56 N. W. 1077:

"The principle of construction almost universally applied by the courts in such cases is that mere general language granting the power to condemn is not to be taken as including the power to appropriate land already subjected to another public use, particularly where the subsequent use will interfere with the former. Power to do that can be granted only by express language covering the particular case, or by necessary implication; and such necessary implication will not ordinarily exist where the general power can be beneficially exercised without taking the particular land in question, or where the two uses are necessarily inconsistent." (Cases cited.)

The legislative policy of the state should also be observed in determining what rights such a general grant is intended to embrace. An examination of the legislative declarations discloses that certain kinds of property devoted to public uses may be condemned and taken for railroad purposes, but no provision of the law grants the right expressly or by necessary implication to so take lands devoted to the use of a public park. A legislative grant to subject such property to another public use is one in derogation of existing law, and renders the rule of *"Expressio unius est exclusio alterius"* applicable to this subject. Whatever is embraced in the statutes giving this right leads clearly and satisfactorily to the conclusion that it was intended that the right should be confined to the particular property therein specified.

It is argued that, since the court found it was necessary to take the designated part of Mitchell Park to enable petitioner to build its railroad, the calls of the statute have been met by necessary implication, when applied to the facts and circumstances of the case. It is true some courts hold that the grant of a power to build a railroad may by necessary implication be construed to authorize the taking of property already subjected to public use, when it appears that without such a taking it would be well-nigh impossible to exercise it beneficially. This construction has been applied in cases of general grants, where it appeared that the proposed railroad could not be built unless it be permitted to cross the tracks of another railroad, where it is apparent that the grant would be ineffectual without the right to make such crossing (*Providence & W. R. Co. v. N. & W. R. Co.* 138 Mass. 277; *State v. Montclair R. Co.* 35 N. J. Law, 328); or where it was apparent the proposed railroad could not be built unless it be permitted to cross public highways (*Starr v. C. & A. R. Co.* 24 N. J. Law, 592); but no right to occupy highways longitudinally has been implied (*Springfield v. C. R. R. Co.* 4 Cush. 63). In this case we are not confronted with a situation requiring a determination of this question, for it is manifest from the facts established in the proceeding that petitioner can efficiently and beneficially exercise the power of locating and building its road between the termini without invading Mitchell Park. Under these circumstances and conditions no necessity can be said to exist for taking any portion of this public park. *Springfield v. C. R. R. Co.* 4 Cush. 63; *In re Boston & A. R. Co.* 53 N. Y. 574; *Adirondack R. Co. v. State,* 176 U. S. 335, 20 Sup. Ct. 460; *Butte, A. & P. R. Co. v. M. U. R. Co.* 16 Mont. 504, 41 Pac. 232; *Wood v. M. & B. R. Co.* 68 Ga. 539; 1 Lewis, Eminent Domain, § 276; *In re Application of Buffalo,* 68 N. Y. 167; *Mobile & G. R. Co. v. A. M. R. Co.* 87 Ala. 501, 6 South. 404.

It follows from these conclusions that the court erred in appointing commissioners as prayed for.

By the Court.—The order of the circuit court appointing commissioners is reversed, and the proceeding remanded with directions to dismiss the application.

The following opinion was filed February 15, 1905:

DODGE, J. While I concur in the reversal of the order appealed from and with the reasons upon which our judgment rests, I cannot bring myself to assent to certain views, expressed in the opinion, which indicate that, but for inclusion of park lands, the order would be affirmed. Stats. 1898, sec. 1846, requires that a railroad company, in order to condemn land for its main line, shall allege in its petition that it is duly incorporated and that "it is its intention in good faith to construct the road authorized by its charter." Now, with reference to these allegations, I understand the opinion to declare, first, that they are not issuable, and, secondly, that, if issuable, they are both conclusively supported by production of the patent granted by the secretary of state. I do not feel at liberty to convict the legislature of the absurdity of industriously requiring a petitioner to assert such facts, wholly within its own knowledge and easy of proof, if true, with no purpose whatever. If they are not issuable, then any individual or association of individuals not incorporated at all may, in practical result, institute and carry through such condemnation, to the invasion of most sacred private rights and without any justification in either a purpose or duty on petitioner's part to perform any public service to justify the exercise of this high governmental prerogative. I cannot doubt that the statute, so construed, would in practical effect authorize the taking of property for a purely private purpose, in defiance of both the state and national constitutions. I venture the assertion that nowhere else in the multitude of

statutes prescribing inimical proceedings, with right of defense, has it been held that requirement that the preliminary pleadings allege a fact did not also require that fact to be proved, if denied. *Wis. Cent. Co. v. Kneale,* 79 Wis. 89, 48 N. W. 248. The opinion proceeds, however, to declare that, even if these two alleged facts be issuable, they are conclusively established by production in evidence of the patent from the state. I grant this as to the first, namely, the fact of corporate existence, for the very sufficient reason that the statute (sec. 4181) expressly so provides; but I search that section and the statute book at large in vain for any legislation giving to such patent any force as evidence of the good-faith intent to build the railroad. The maxim *"Expressio unius est exclusio alterius"* would therefore seem to present an impregnable obstacle to such a holding. Again, the legislative purpose that this intent should be matter of substance in an attempt to condemn for a main line is conclusively evinced by the omission of any similar requirement in case of condemnation for station grounds or yards, where is presupposed existence of a main track, which is thus legislatively made sufficient proof of the intent and ability to serve a public purpose.

It is said in the opinion that the court has considered the varying conclusions of the courts on this question in different jurisdictions. If any of such conclusions vary toward support of the views expressed, I have been unable to find them. None are cited so much as suggesting nonissuability of an allegation of either good faith or corporate existence on the part of a corporation, not public or municipal, when required by statute. The contrary is held in *Hodgerson v. St. L., C. & St. P. R. Co.* 160 Ill. 430, 43 N. E. 614; *Railway Co. v. Petty,* 57 Ark. 359, 21 S. W. 884; *Chicago, B. & N. R. Co. v. Porter,* 43 Minn. 527, 46 N. W. 75; *Atlantic & O. R. Co. v. Sullivant,* 5 Ohio St. 276; *Peoria & P. U. R. Co. v. P. & F. R. Co.* 105 Ill. 110; *In re Metropolitan E. R. Co.* 12 N. Y.

Supp. 506, 508; *In re Metropolitan T. Co.* 111 N. Y. 588, *601, 19 N. E. 645. In the last of these the statute and the situation were practically identical with the present, and the court's argument seems to me unanswerable.

Even if the question were entirely *res nova* and without suggestion from other statutes as to legislative intent, I could not doubt the purpose to require, as condition precedent to the order of condemnation, full showing of good-faith intent to build a railroad. The right of eminent domain, to take from an individual his private property which he wishes to retain, is one of the most extreme powers of government and, under our constitution, can be exercised only for a public purpose. When that most oppressive power is delegated to a railroad corporation, whose primary purpose is private gain, the legislative guardians of the people's rights would be derelict indeed if they did not so hedge about the grant as to preclude to the utmost the perversion of that power from the public purpose, which alone can justify it, to the private advantage of the delegatee, since such attempts are to be expected from the very nature of mankind, especially when in corporate association. Only because a railroad serves a public purpose and function can the delegation to a railroad company be justified at all. How abusive, therefore, would it be to confer this high prerogative upon a corporation which neither does nor intends to serve any such purpose. Legislatures are not to be easily suspected of such intention. Terminal grounds in *Milwaukee* might well be so essential to the public purpose to be served by a railroad running over an extensive section of country that the exercise of this high power might properly be conferred upon such a company; but, obviously, that power ought not to be conferred upon some corporation which has no such purpose, but desires merely to acquire such rights in property for purposes of speculation, or even of blackmail. I by no means suggest that any such purpose is entertained by the present corporation; but it is a

possible motive, and therefore offers a most cogent reason why the legislature should have deemed the *bona fide* intent to build the whole road an essential fact preliminary to the casting upon private property of even the cloud resulting from an order of condemnation, though the proceedings should go no further. One of the appellants here presents a striking illustration of the practical injury that may result merely from the institution of the proceedings. That appellant owns and operates a large factory, through which the right of way passes, severing into two parts the very building. It needs no words to paint the embarrassment under which such an owner labors during the period of uncertainty whether his property will be taken or not. He cannot commit himself to the acquirement of a new site and new buildings, he cannot safely enlarge his business or equipment at the old stand, nor can he enter into large engagements to supply his product. Why should not such a sufferer yield readily to demands for blackmail to terminate the peril against which the present construction of the law offers him no protection?

For such reasons as these, were there no others, I cannot but believe that the legislature intended to require the existence of the very fact of a good-faith purpose to build a railroad as a condition of the disturbance of private rights of property by a corporation. Unless that fact is required to be established by judicial investigation on the hearing following the petition for condemnation, it is not required to exist. Neither the affidavits of the incorporators nor the verification to the petition constitutes the fact. Upon the doctrine now announced by the court all such affidavits may be absolutely false, neither the intent nor the ability to serve any public purpose may exist at all, and yet the confiscation of private property proceed to consummation. Not even is there the usual probability of criminal responsibility to deter the falsification of such affidavits, for the affiants need not either reside or come within this state, so as to be within reach of its

process. I am therefore of opinion that the question of the good-faith intent of a petitioning railroad corporation to build the road authorized by its charter is an issuable one, to be resolved upon any evidence relevant thereto.

I ought, perhaps, to note an inaccuracy in the opinion, in that it states that the trial court found that the petitioner did intend in good faith to build the road authorized by its charter. The finding made is merely that it intends to build such road "upon, over, and across the lands mentioned and described in the petition." Those lands are all in Milwaukee county, while the road authorized by the charter extends from Milwaukee to East St. Louis, in Illinois. I can find in the record no evidence of any purpose, plan, or ability to build the road so authorized.

WINSLOW, J. I concur in the separate opinion of Mr. Justice DODGE.

Upon a motion for a rehearing there was a brief by *John F. Burke,* attorney, and *Henry C. Wood* and *Colin C. H. Fyffe,* of counsel, for the respondent.

In reply to such motion there was a brief by *Carl Runge,* city attorney of *Milwaukee,* and *Timlin & Glicksman* for *Canar* and *Higby,* and a separate brief by *Miller, Noyes & Miller* for the *International Harvester Company.*

The motion was denied April 5, 1905.

KERWIN, J., took no part in the decision of this case.

McCord, Appellant, vs. Edward Hines Lumber Company, Respondent.

January 11—April 5, 1905.

Statute of frauds: Oral promise to answer for debt of another: Advances on logging contract.

Plaintiff contracted with a corporation to cut and haul logs from his lands, it being understood that as the subcontractors needed supplies and money for the work plaintiff would make advances to them, to be deducted from the amounts becoming due from him to the principal contractor. Afterwards plaintiff sold much of the timber to defendant and assigned to it the logging contract so far as it affected the timber sold. This sale was in part tentative and dependent upon the result of investigation of titles, etc. For certain necessary advances to be made by plaintiff pending such investigation defendant orally agreed to reimburse him. *Held*, that this was not a promise to answer for a debt of the subcontractor to whom such advances were made, but was an original promise to repay sums of which defendant received the benefit, and hence was not within the statute of frauds.

Appeal from a judgment of the circuit court for Douglas county: A. J. Vinje, Circuit Judge. *Reversed.*

In October, 1899, the plaintiff and a corporation of which he was president, the McCord Lumber Company, owned and controlled a very large amount of timber tributary to Superior, and had made a general logging contract with the Bayfield & Western Railway Company, whereby the latter, through a series of years, was to cut, log, and haul the logs to the booms of the plaintiff tributary to his sawmill at Superior. Logging operations had already commenced, largely through the medium of subcontractors, who were employed by the railway company to do the cutting and loading on the cars. It was the contemplation and understanding between the railway company and McCord that, as these loggers needed supplies and small amounts of money for payment of

men quitting during the season, and such things, the plaintiff and his company should make such advances, and withhold the same out of the various instalments which might become due the railway company upon its contract as logs were delivered, such advancements being customarily necessary in order to enable the pushing forward of the logging, which was highly important to the owner of the logs. They would, of course, constitute payments on the railway company's contract liability to the loggers. On October 2, 1899, the McCord Lumber Company and the plaintiff entered into written contracts with the defendant of much complexity, but in substance transferring to the defendant the rights of plaintiff and his company to a very large amount of timber, the sawmill at which it was contemplated such logs should be sawed, and also the assignment of the McCord Company's contract with the railway company so far as it applied to any of the timber transferred to the defendant, whereby the defendant was to step into the place of the plaintiff and his company in the possession and operation of the sawmill and the ownership and receipt of the logs under the railway company contract, and also with reference to the payment of all sums due the railway company upon such contract. The transaction with the defendant involved the investigation of title and adjustment of incumbrances on a large amount of lands, and was in part tentative and dependent upon the satisfactory result of such investigation and arrangement as to securities. As the defendent well knew, upon a certain section 34 one Colbroth, as a subcontractor of the railway company, had already commenced logging operations, and was expected and desired by all to push them forward with vigor. Necessarily, at the time of consummating the contract of October 2, 1899, it became important for the defendant to examine many things, to visit the lands, develop the details of the logging operations, etc. At about this time it is claimed by the plaintiff that Colbroth

requested certain supplies, and certain advancements for supplies already received, and the like, and the plaintiff submitted to the defendant's agent such request, and was, by that agent, requested to go on temporarily as if he, the plaintiff, were still the owner, to make the advances necessary to keep the work running, such agent promising that as soon as the details of investigation, etc., were completed, the defendant would reimburse all such advances, if that timber were accepted, as it afterward was; the defendant, of course, having the opportunity to reimburse itself out of the sums which would come due to the railway company upon the delivery of the logs under its contract. Plaintiff also gave testimony that after the advances had been made and the transfers to defendant consummated defendant assented to and promised to repay all the advances specified in the complaint. The defendant and its agent denied making any such promises.

The issues of fact were submitted to the jury, who returned a verdict for the plaintiff in substantially the sum claimed by him, whereupon defendant moved for judgment notwithstanding the verdict, for the reason that the promise, if any was made by the defendant, was to pay the debt of another, to wit, Colbroth, and was not in writing. The court granted such motion and entered judgment dismissing the complaint, from which the plaintiff appeals.

For the appellant there was a brief by *Luse, Powell, deForest & Luse,* and oral argument by *L. K. Luse.*

Solon L. Perrin, for the respondent.

The following opinion was filed January 31, 1905:

Dodge, J. The jury having returned a verdict for plaintiff, judgment for defendant can be justified only if the evidence conclusively establishes that the defendant's promise was to answer for the debt or default of another, which, by subd. 2, sec. 2307, Stats. 1898, is void if not in writing. This provision comes to us from the original statute of

frauds, 29 Car. II, of which it has been said by an enthusiast that every line was worth a subsidy, and by a cynic that every line has cost a subsidy to interpret. The latter statement has been gaining force as the ingenuity of greed has, through centuries, been strained to escape this apparently plain provision, until its application is now surrounded by such a cloud of decisions as to defy exhaustive examination. In them, as might be expected, will be found reasoning and *dicta* well calculated to confuse exact lines of demarkation. Nevertheless such lines can be traced with reasonable certainty and distinctness. The promise voided by the statute is one to *answer* for the debt or default of *another*. Hence the statute has no application unless there be a primary obligation of some one else, and the promise be to answer for that as such. In other words, the promise must be collateral to and dependent upon the breach of a recognized obligation primarily owed by another. If such it be, however, it is void unless in writing. There are many *dicta* and some decisions indicating that this result may be escaped if there is a new consideration for the guaranty, or if such consideration consist of benefit to the guarantor. The statute, however, recognizes no such exception. There must, on general principles, be new consideration for the promise of indemnity in any event to render it valid, written or unwritten; hence to say that the existence of such consideration alone takes the promise out of the statute is to deny the statute any force whatever. 1 Brandt, Suretyship (2d ed.) § 60. Again, there are statements in the cases to support evasion of the statute if the leading object of the promisor is to benefit himself, or if the creditor principally relies on the guarantor. All such statements are misleading. None of such considerations will of themselves prevent the application of the statute if the promise is really to answer for the debt of another. Each of them may, however, serve as evidence in special cases to show that

the promise is really to pay an original obligation of the promisor, to which the statute offers no obstacle, however much such obligation may co-exist with or be measured by the debt of another. The existence of such original obligation will be found on careful analysis to be the true basis of most of the decisions where a new consideration has been given prominence. A few of the cases illustrating the situations in which the undertaking will be considered original, and not merely collateral to and dependent upon the third person's obligation, are the following: *Putney v. Farnham,* 27 Wis. 187; *Young v. French,* 35 Wis. 111; *Hoile v. Bailey,* 58 Wis. 434, 17 N. W. 322; *Lessel v. Zillmer,* 105 Wis. 334, 81 N. W. 403. An illustration of the reverse situation, where, although there was a new consideration involving benefit to the promisor, his promise was absolutely collateral—a mere guaranty of the debt of another—and therefore avoided by the statute, is *Commercial Nat. Bank v. Smith,* 107 Wis. 574, 93 N. W. 766.

The parties here negotiated and finally agreed upon a sale from plaintiff and his company to defendant of certain standing timber which the latter desired transformed into saw logs with all possible expedition. It was important that such transformation progress during the period of negotiation, examination of title, and arrangement of details. To that end it was necessary that some one make advances. When transfer was finally made at the prices fixed for standing timber, that timber had been advanced toward its next stage of saw logs to the extent of the logging work done in the interim, and was enhanced in value to an amount presumptively in excess of the advances made by plaintiff, and those advances were available as a credit upon the contract price for cutting and hauling the logs, which defendant had agreed to assume. Hence, upon final conveyance by plaintiff and his company, they transferred by their written contract the tim-

ber, but also the addition thereto resulting from partial transformation into logs, and defendant thus received full and adequate beneficial consideration for a promise to pay for such addition or enhancement in value. The evidence certainly tends to support the view that, in addition to the timber, defendant in November purchased from plaintiff the enhancement of the same which his money had procured; or, in another aspect, purchased his right to a credit upon the railway company's logging contract to the amount of such advancements, and agreed to pay him a price therefor. This, of course, would be an obviously original promise to pay a price for property purchased by the defendant, and would be in no wise affected by the fact, if it existed, that Colbroth, or any one else, might be indebted to plaintiff for those advances, for it would not necessarily be collateral to, or in any wise dependent upon, either existence of such debt or default therein by Colbroth. Indeed, if such debt existed, the transaction would, in effect, work a purchase of it by defendant, not a guaranty of it. The promise was in terms, not to pay what Colbroth owed, but to pay plaintiff certain sums because he had advanced them and defendant had the benefit. No reference was made to the fact that Colbroth owed a debt at all, nor was the amount which defendant promised to pay at all dependent on the amount which Colbroth owed. We are convinced that the evidence fully justified the jury in finding that defendant's promise was an original one to pay a price for something of value which it received from plaintiff and his company. They having so found by their general verdict, the statute of frauds offered no obstacle to its validity.

A further test, which is often applied, is whether the thing promised by the defendant is identical with the obligation owed by the third person. If not—if it be to do something different, though it may include some part or the whole of

the latter's obligation—it will ordinarily be deemed not a mere promise to answer for the debt of another, but an original undertaking not affected by the statute. Thus, indemnity to a surety upon a debt owed by the third person to a fourth has been held valid because the third person owed no debt to the surety, but merely might, on a contingency, become under obligation to him by implication of law, not to pay the debt, but to reimburse him in case he had to pay, while the defendant's promise was to protect him against the necessity of paying at all. Another illustration is where the owner of a machine warranted it to work to a certain standard, while the defendant agreed that it should work to the satisfaction of the plaintiff. This distinction, while in some conflict in other jurisdictions, has been fully adopted in Wisconsin. Browne, Stat. Frauds (5th ed.) §§ 161 *et seq.; Shook v. Vanmater,* 22 Wis. 532; *Vogel v. Melms,* 31 Wis. 306; *Hull v. Brown,* 35 Wis. 652. We deem such distinction applicable here, for in no view of the evidence can there be found any obligation resting on either Colbroth or the railway company to pay the plaintiff the amount of his advances. There is no express agreement to repay any part of them on any contingency. The agreement and understanding as stated by *McCord,* without dispute, was merely that any such advances should be treated as a payment upon the $3.50 per M. which he was bound to pay to the railway company for completed cutting and hauling of the logs. If there was any implied agreement of reimbursement, it went no further than to make plaintiff good in the ultimate contingency of his not receiving enough logs under that contract to satisfy his advances, or, perhaps, upon abandonment of the logging contract. Clearly he could not, at the time of his transaction with defendant, demand or sue for the amount of those advances as against Colbroth. Hence the promise of defendant to pay him that amount absolutely and without contingency

was in no wise identical with any debt or obligation owing from any third person, and on the authority of the above-cited cases is not within the statute of frauds.

For the reasons stated we must conclude that the action of the trial court in ordering and entering judgment for defendant was erroneous.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment for plaintiff upon the verdict.

Upon a motion for a rehearing there was a brief by *Solon L. Perrin,* attorney, and *R. M. Bashford,* of counsel, for the respondent.

In reply to such motion there was a brief by *Luse, Powell, deForest & Luse,* for the appellant.

The motion was denied April 5, 1905.

SCHMIDT, Plaintiff in error, vs. THE STATE, Defendant in error.

February 25—April 5, 1905.

Criminal law: Manslaughter in fourth degree: Self-defense: Degree of force: Instructions to jury: Curing error.

1. A conviction of manslaughter in the fourth degree under either sec. 4362 or sec. 4363, Stats. 1898, is *held* to have been warranted by evidence from which the jury might have concluded either that the pistol, by the accidental discharge of which the homicide was committed, was unlawfully pointed by defendant at the deceased, or that it was lawfully so pointed but the discharge thereof was the result of culpable negligence.
2. One assaulted is entitled to act upon his apprehensions of imminent peril, reasonably justified by the circumstances, not only in deciding to use force to repel the assault but also in

deciding as to the amount of force to be used; and it was error to charge the jury, in such a case, that the assaulted person had a right to use no greater force than was "actually necessary under all the circumstances."

3. An erroneous instruction is not cured, nor the presumption of prejudice therefrom overcome, by a correct statement of the law on the same subject elsewhere in the charge.

ERROR to review a judgment of the circuit court for Oneida county: W. C. SILVERTHORN, Circuit Judge. *Reversed.*

Information for murder committed by the plaintiff in error, hereinafter for brevity termed the defendant, upon one George Vieux, under substantially the following circumstances: Vieux was a large, powerful man, twenty-three years of age, abusive and quarrelsome when intoxicated, and defendant was a comparatively small man, fifty years of age, and on Christmas day, 1902, was in charge of a saloon at Three Lakes, Oneida county, Wisconsin. Vieux had been in such saloon once or more during the afternoon of that day, and had quarreled violently with the defendant, throwing him down and bruising him. After a short absence he returned, attacked a chore boy, who fled for safety behind the bar where defendant was serving, whereupon Vieux came threateningly toward the bar, the evidence differing whether close to it or a few feet away. Defendant picked up a pistol, held it in both hands resting on the counter, and ordered deceased to depart. There was evidence of previous threats on the part of defendant to kill or shoot Vieux if he returned. There is some conflict as to whether Vieux retreated a step or two when the pistol was presented or persisted in his threatening attitude. Almost momentarily the pistol was discharged, without intention or volition on his part, as defendant claims. Vieux was shot and killed. The jury found a verdict of manslaughter in the fourth degree, and judgment and sentence to the state prison for two years was entered, to review which defendant brings this writ of error.

The cause was submitted for the plaintiff in error on the brief of *A. W. Shelton.*

For the defendant in error there was a brief by the *Attorney General* and *Walter D. Corrigan,* assistant attorney general, and oral argument by *Mr. Corrigan.*

DODGE, J. The first assignment of error is that a conviction was not warranted. With this, after a careful examination of the evidence, we find ourselves unable to agree, although conceding that there is plenty of evidence which might have warranted a contrary conclusion by the jury. That defendant did not voluntarily discharge the pistol is declared by himself, and to some extent supported by other evidence, and the jury must have reached this conclusion in finding manslaughter in the fourth degree, for this, under the circumstances, must have consisted either in the accidental discharge of the pistol while defendant was doing some unlawful act, under sec. 4362, Stats. 1898, or, if the act being done was lawful, then by culpable negligence (sec. 4363, Stats. 1898). We are persuaded that there is evidence from which either of these conclusions may have been reached. The pointing of the pistol at the deceased might have been lawful or unlawful, according to the apparent imminence of an attack or breach of the peace by the deceased. Upon this question the evidence is conflicting. On the other hand, if the jury found that the threatening of the deceased with a pistol was justified by the apparent danger, so that the act was lawful, they might nevertheless have found that the discharge of the pistol was the result of culpable negligence. There is evidence of the entire ignorance of the defendant as to the use of a pistol, and of the fact that, as he held it toward the deceased in both hands, his thumbs were in contact with the trigger. We are not prepared to say that with so dangerous a weapon as a pistol such method of handling might not be deemed culpable negligence.

Error is also assigned upon an instruction, generally, to the effect that the defendant, being in charge of the saloon, had a right to use force to quell a disturbance therein, and if, in so doing, he was assaulted by the deceased, had a right to repel such assault with reasonable force, and such as was necessary to accomplish that purpose, "and no greater or other force than was actually necessary under all the circumstances." This was error. It is no less true that one assaulted is entitled to act upon his apprehensions, reasonably justified by the circumstances, in deciding as to the amount of force which he may use, than that such apprehension may justify him in using force at all; and to tell the jury that he may use no more force than is "actually necessary" is as erroneous as to tell them that, before he can use force at all, the peril of an assault must be actually imminent, instead of merely imminent to his reasonable apprehension. *Perkins v. State,* 78 Wis. 551, 47 N. W. 827; *Richards v. State,* 82 Wis. 172, 51 N. W. 652; *Ryan v. State,* 115 Wis. 488, 502, 92 N. W. 271; *State v. Hickam,* 95 Mo. 322, 328, 8 S. W. 252; *State v. Brooks,* 99 Mo. 137, 144, 12 S. W. 633; *State v. Harper,* 149 Mo. 514, 528, 51 S. W. 89; 1 Bishop, New Crim. Law, §§ 305, 874.

The state urges that such error was cured by an instruction elsewhere in the charge to the effect that defendant was justified in acting upon the facts and circumstances as they reasonably appeared to him. We do not find any such instruction clearly addressed to the *quantum* of force justified, but merely to the imminence of peril justifying force at all. Even if it be deemed applicable to the former subject, however, it was not given in connection with and as a qualification of the instruction now assailed, as was the case in *Richards v. State, supra.* It was an independent statement of a general rule of law. An erroneous instruction is not cured, nor the presumption of prejudice therefrom overcome, by a correct statement of the law on the same subject elsewhere in the charge.

Imhoff v. C. & M. R. Co. 20 Wis. 344, 346; *Eggett v. Allen,* 106 Wis. 633, 638, 82 N. W. 556; *New Home S. M. Co. v. Simon,* 107 Wis. 368, 378, 83 N. W. 649.

By the Court.—Judgment reversed, and cause remanded for a new trial. The warden of the state prison will deliver the plaintiff in error, *Frank Schmidt,* to the sheriff of Oneida county, who is directed to keep the said *Schmidt* in his custody until discharged therefrom by due process of law.

EAU CLAIRE NATIONAL BANK, Respondent, vs. CHIPPEWA VALLEY BANK, Garnishee, imp., Appellant.

March 14—April 5, 1905.

Garnishment: Bank: Fraudulently transferred note and mortgage received for collection: Interpleader: Judgment: Interest: Costs.

1. A note and mortgage were assigned by husband to wife in fraud of creditors and were by the wife placed in a bank for collection. After it had received a check from the mortgagor in payment, the bank was garnished by a creditor of the husband and had notice of the plaintiff's claim that the assignment to the wife was void. It nevertheless paid the money to the wife, who had also been made a garnishee. *Held,* that under sec. 2768, Stats. 1898, the bank was liable as garnishee.
2. Although the bank and the wife of the principal defendant were proceeded against severally as garnishees, yet all were parties to the proceeding, so that no interpleader was necessary, and a judgment in favor of the plaintiff against the bank as garnishee, and also determining that the wife had no title to the note and mortgage, was proper.
3. Under sec. 2768, Stats. 1898, the bank was liable in such case for interest on the amount found to have been in its possession as garnishee, from the date of the judgment in favor of plaintiff in the original action.
4. The bank having denied all liability, costs were properly awarded against it, under sec. 2772, Stats. 1898.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Modified and affirmed.*

It appears from the record that May 28, 1902, the plaintiff commenced an action against John T. Friend and three other parties to recover $5,976, over and above all offsets, founded upon express contract. In addition to the facts mentioned, the affidavit for garnishment stated, in effect, that the affiant believed that Louise E. Friend and the *Chippewa Valley Bank* were indebted to or had property, real or personal, in their possession or under their control belonging to the defendant John T. Friend, who had not property liable to execution sufficient to satisfy the plaintiff's demand, and that such indebtedness or property was, to the best of the affiant's knowledge and belief, not by law exempt from seizure and sale upon execution.

The *Chippewa Valley Bank,* through its cashier, on June 3, 1903, separately answered such garnishment upon oath, and therein stated that at the time of the service of the garnishee summons upon it "the *Chippewa Valley Bank* was then, and is now, in no manner and upon no account whatever indebted or under liability to the defendant John T. Friend, and that it then had, and now has, in its possession or under its control, no real estate and no personal property or credits of any description whatever belonging to said defendant or in which he has any interest, and is in no manner liable as garnishee in this action." On the same day the plaintiff's attorneys notified the attorneys of the *Chippewa Valley Bank* that the plaintiff thereby elected to take issue on the answer of the *Chippewa Valley Bank* therein to the garnishee summons, and would maintain it to be liable as garnishee.

On June 16, 1902, Louise E. Friend separately answered such garnishment upon oath to the same effect as the answer of the *Chippewa Valley Bank,* and on the same day the

plaintiff, by its attorneys, notified the attorneys for the said Louise E. Friend that they thereby elected to take issue on the answer of Louise E. Friend therein, and would maintain her as liable as garnishee.

On April 18, 1903, the plaintiff recovered judgment in the circuit court in the original action against John T. Friend and the other three parties referred to, in the sum of $6,621.18 damages and costs. On April 11, 1904, such issues on the respective answers of the garnishees, the *Chippewa Valley Bank* and Louise E. Friend, were tried, and at the close of the trial the court found, as matters of fact, in effect: (1) That judgment was rendered and entered in the original action as stated; (2) that at the time of the garnishment (May 28, 1902) the *Chippewa Valley Bank* had in its possession and under its control a certain promissory note secured by mortgage on real estate, dated July 10, 1900, and executed and delivered by Theodore and Ida Maas, and payable to John T. Friend, for $800, with interest, amounting in all on that date to $844.88, together with an assignment of said note and mortgage by John T. Friend to Louise E. Friend dated February 13, 1902; also a satisfaction of said mortgage, dated May 23, 1902, and executed by Louise E. Friend; also a check signed by William A. Teall, agent, on the "New Bank of Eau Claire," payable to the order of the *Chippewa Valley Bank,* for $844.88, which had been delivered to and accepted by the *Chippewa Valley Bank* in payment of said note and mortgage, and which was afterwards, and on May 28, 1902, paid by said New Bank of Eau Claire to the *Chippewa Valley Bank,* and which property so in the hands of the *Chippewa Valley Bank* was at the time of the value of $844.88; (3) that said note and mortgage and check at the time of the garnishment were owned by and the property of John T. Friend, and the note and mortgage had been placed in the *Chippewa Valley Bank* for collection and payment by Louise E. Friend; (4) that said assignment of the

note and mortgage from John T. Friend to Louise E. Friend was made by said John T. Friend, and received by Louise E. Friend, for the purpose of hindering, delaying, and defrauding the creditors of John T. Friend, and that in making said assignment said Louise E. Friend had notice of and participated in said fraud; that at the time of making the assignment the plaintiff was a creditor of John T. Friend, and said assignment was void as against the plaintiff; (5) that the note and mortgage were not purchased by the said Louise E. Friend from the said John T. Friend for a valuable consideration paid out of her separate estate; (6) that the *Chippewa Valley Bank* at the time of the garnishment had notice of the fact that the plaintiff claimed that said property was the property of John T. Friend, and that the assignment thereof by him to his wife, Louise E. Friend, was fraudulent and void as against the plaintiff; and the *Chippewa Valley Bank* also had notice that by said garnishment the plaintiff sought to reach, levy on, and hold said property as the property of John T. Friend; (7) that the garnishee, Louise E. Friend, had no right, title, or interest in said note, check, or mortgage, or the proceeds thereof, as against the plaintiff herein.

And as conclusions of law the court found, in effect, that the plaintiff is entitled to judgment against the *Chippewa Valley Bank* for $844.88, with interest thereon from May 28, 1902, besides the costs in this action; and to judgment that Louise E. Friend acquired no interest in said note and mortgage by virtue of said assignment as against this plaintiff. Judgment was thereupon entered in accordance with such findings. From that judgment the *Chippewa Valley Bank* appeals.

For the appellant there was a brief by *Bundy & Wilcox,* and oral argument by *C. T. Bundy.* They contended, *inter alia,* that as the garnishees were severally proceeded against (sec. 1753, Stats. 1898) the proceeding against each must be deemed, under sec. 2766, a separate action, and a judgment

against one of them cannot operate as an estoppel against the other. *Emmons v. Dowe,* 2 Wis. 358–360. It was error, therefore, in the action against the bank to adjudicate the invalidity of the transfer to Louise E. Friend and attempt to divest her title. An interpleader in that action was necessary. Sec. 2610, Stats. 1898; *Emerson v. Schwindt,* 108 Wis. 167, 172.

For the respondent there was a brief by *Wickham & Farr,* and oral argument by *James Wickham.* They argued, among other things, that where a bank has notice that funds in its hands deposited by one person are claimed to be the property of the defendant in a garnishee proceeding, and, notwithstanding such notice, pays the money over to the person who made the deposit, it is liable as garnishee. *Ferry v. Home Sav. Bank,* 114 Mich. 321, 72 N. W. 181; *Sykes v. City Sav. Bank,* 115 Mich. 321, 73 N. W. 369; *Bryant v. Wilcox* (Mich.) 100 N. W. 918; *Citizens' State Bank v. Council Bluffs F. Co.* 89 Iowa, 618, 57 N. W. 444; 14 Am. & Eng. Ency. of Law (2d ed.) 844; *Gregg v. F. & M. Bank,* 80 Mo. 251; *Raynes v. Lowell I. Ben. Soc.* 4 Cush. 343.

CASSODAY, C. J. It is contended by counsel that the *Chippewa Valley Bank,* as a matter of pure accommodation, received the papers mentioned in the foregoing statement from one party, to be delivered to another, upon payment by that other of a sum of money in exchange for the papers, the bank having no interest whatever in the transaction, not even making a charge for the services. In the principal case relied upon in support of such contention, "the answers of the supposed trustee" disclosed the facts that:

"He had been in treaty with the defendant for a cow, to be purchased if approved. No bargain had been completed, and before the time of trying the cow had expired, and before the service of the plaintiff's writ, he had notified the defendant that he should not purchase the cow and had deliv-

ered her to him, but the defendant left her in his possession, where she was at the time of the service of the plaintiff's writ." *Staniels v. Raymond,* 4 Cush. 314, 315.

Upon such facts it was there held, in effect, that the mere possession by the garnishee was insufficient to make him liable as the trustee of the owner. It is true, as claimed by counsel, that that case has frequently been cited with approval by this court. *Winterfield v. M. & St. P. R. Co.* 29 Wis. 589, 592; *Bates v. C., M. & St. P. R. Co.* 60 Wis. 296, 307, 19 N. W. 72; *Gleason v. South Milwaukee Nat. Bank,* 89 Wis. 534, 536, 62 N. W. 519; *Gore v. Brucker,* 94 Wis. 65, 69, 68 N. W. 396; *Hussa v. Sikorski,* 101 Wis. 131, 135, 76 N. W. 1117. In *Bates v. C., M. & St. P. R. Co.* the attempt was made by garnishment process, served in Milwaukee at 5 a. m., to reach a carload of hogs while in actual transit from Lyons in Walworth county to Chicago, and which was delivered to the consignee at 7:20 o'clock the same morning. In the *Gore Case, supra,* an agent of the owner of a chattel mortgage who had taken possession of the property pursuant to the terms of the mortgage, and as such agent held the same for his principal, was not, by reason of such possession, subject to garnishment in an action against the mortgagor, even though the mortgage was void as against the mortgagor's creditors. As stated in that case:

"The plaintiff was at perfect liberty to attach the property so in the custody of Brucker, since the same was open and tangible, and, in fact, inspected by the plaintiff's general manager. Had the plaintiff so attached, Lapidus [the owner of the mortgages] would have had an opportunity to assert his right as mortgagee, and to have the same determined in a proper form."

In the *Hussa Case,* cited, the mortgagor put the money in the hands of an agent to be paid over to the mortgagee in satisfaction of the negotiable note which the mortgage had been given to secure, and it was held that such agent was merely an agent of the mortgagor to transmit the money from him

to the mortgagee, who was the principal defendant in the action, "and was not a debtor of the mortgagee, nor liable as his garnishee." In that case the garnishee answered that he was not indebted to and that he had no money or property of the defendant in his possession, except $510, which sum he was informed and believed belonged to him, but which was claimed by his wife, and he asked that she be required to interplead, as prescribed by statute (sec. 2767, Stats. 1898), and she was thereupon brought into the action and made answer, and the question of the ownership of the money was determined upon such answer.

The case at bar differs essentially in its facts from any of the cases thus relied upon. In this case the note and mortgage were payable to Mr. Friend. He assigned them in writing to his wife. The note, mortgage, and assignment, with a satisfaction of the same signed by Mrs. Friend, were placed in the *Chippewa Valley Bank* for collection. The mortgagor caused a check for the amount due on the note and mortgage, and payable to the order of the *Chippewa Valley Bank,* to be delivered to that bank in payment of the note and mortgage. In that condition of things the garnishee summons was served. The *Chippewa Valley Bank* thereupon drew the money on the check and paid it over to Mrs. Friend, and delivered the other papers to the mortgagor, notwithstanding the allegation in the garnishee papers that the note and mortgage and the money due thereon were the property of and belonged to Mr. Friend, and that the plaintiff would so maintain notwithstanding its answer. The real controversy was whether such property belonged to Mr. or Mrs. Friend. Instead of submitting the facts to the court and thus relieving itself from all liability, it assumed that such property belonged to Mrs. Friend, and hence denied being indebted to or having in its possession or under its control any property whatever belonging to Mr. Friend.

Our statute prescribing the liability of a garnishee is much broader than the Massachusetts statute, and declares that:

"From the time of the service of the summons upon the garnishee he shall stand liable to the plaintiff to the amount of the property, moneys, credits and effects in his possession or under his control belonging to the defendant or in which he shall be interested to the extent of his right or interest therein, and of all debts due or to become due to the defendant, except such as may be by law exempt from execution. Any property, moneys, credits, and effects held by a conveyance or title *void as to the creditors* of the defendant shall be embraced in such liability." Sec. 2768, Stats. 1898.

The language thus quoted has been in force ever since the revision of 1878. The last sentence thus quoted was, by way of amendment to the prior statutes, added by that revision, so as "to expressly cover property held in fraud of creditors." Revisers' Notes, 1878. This court has repeatedly declared that the words thus added, in connection with other provisions of the statutes cited, "clearly evince a purpose to make the remedy by garnishment as effectual in reaching nonleviable assets, things in action, evidences of debt, credits, and effects, and in fact any property held by any sort of conveyance or title void as to the creditors of the principal defendant, as the old creditors' bill in chancery. Such is the logical result of previous decisions of this court." *La Crosse Nat. Bank v. Wilson,* 74 Wis. 391, 398, 43 N. W. 153; *Bloodgood v. Meissner,* 84 Wis. 452, 456, 54 N. W. 772; *Bragg v. Gaynor,* 85 Wis. 468, 485, 55 N. W. 919; *Spitz v. Tripp,* 86 Wis. 25, 28, 56 N. W. 330; *Jones v. Alford,* 98 Wis. 245, 251, 73 N. W. 1012; *Dahlman v. Greenwood,* 99 Wis. 163, 167, 74 N. W. 215; *Stannard v. Youmans,* 100 Wis. 275, 279, 280, 75 N. W. 1002. The case presented comes within the comprehensive language of the statute quoted.

Counsel argues that to hold a bank liable as such garnishee

is a great annoyance and obstruction to business. But that is a question for the legislature, and not for the courts.

2. It is true the two garnishees were severally proceeded against—Mrs. Friend, as claiming to be the owner of the note and mortgage and the proceeds of the check; and the bank, as the receiver and disposer of the property as mentioned. In such case the statute expressly declares that "any number of garnishees may be embraced in the same affidavit and the summons" therein "provided for." Sec. 2753, Stats. 1898. No joint judgment was rendered in the action. No interpleader was necessary, since both claimants of the property were parties to the proceedings—Mrs. Friend as garnishee, and Mr. Friend as principal defendant. *Look v. Brackett,* 74 Me. 347.

3. Error is assigned because the *Chippewa Valley Bank* was adjudged liable for interest on the $844.88 from the date of garnishment, May 28, 1902, to the entry of judgment in the garnishee proceeding, April 11, 1904. The judgment in the original action was not rendered until April 18, 1903. Until that time the plaintiff had no right to the money. The statute quoted only made the garnishee liable for the amount of moneys, etc., in its possession at the time of garnishment, but is silent as to interest. As soon as the judgment was entered in the original action, however, the plaintiff, as shown by the result of the trial, was entitled to the amount so found to be in the possession of the garnishee. For any delay after that time the plaintiff is entitled to compensation by way of damages for such delay. *J. I. Case P. Works v. Niles & Scott Co.* 107 Wis. 9, 17, 82 N. W. 568; *McCall Co. v. Icks,* 107 Wis. 232, 241, 83 N. W. 313; *Hansen v. Allen,* 117 Wis. 61, 66, 93 N. W. 805.

4. There was no error in the trial court allowing costs against the garnishee. Upon the findings of the court the statute expressly authorized judgment for costs against the garnishee. Sec. 2772, Stats. 1898.

By the Court.—The judgment of the circuit court is hereby modified and reduced so as to entitle the plaintiff only to recover judgment for $844.88, and interest thereon from April 18, 1903, and, as so modified and reduced, the same is affirmed. No costs are allowed in this court to either party, except the plaintiff must pay the clerk's fees.

FROMME, Respondent, vs. O'DONNELL, Appellant.

March 15—April 5, 1905.

Sales: Passing of title: Subsequent measurement and determination of amount due.

1. Where it is apparent from a contract of sale that the parties intended that the measurement of the subject thereof and determination of the amount to be paid should be made at some time after the title had passed, that intention will govern.
2. Plaintiff's assignor contracted to furnish to defendant "enough" pine blocks to pave a certain viaduct, for a certain price per square yard, f. o. b. cars in the city where they were to be used, payment to be made monthly as estimates of the engineer in charge of the work were allowed by the common council for deliveries made during the previous month, defendant "to pay the freight and deduct same from the settlement." *Held*, that title to the blocks passed to defendant upon his accepting them from the cars, but that the measurements from which the amount to be paid should be determined were to be made after the blocks were laid in place on the viaduct.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

Action to recover on contract made between the defendant and the Terre Haute Creosoting Company, and assigned by the latter to the plaintiff, who performed its obligations. The contract is in the following words:

"Milwaukee, Wis., August 14, 1902.

"*Mr. James O'Donnell, Milwaukee, Wis.* We propose to furnish you enough creosoted yellow pine blocks of our own

manufacture to pave 16th Street Viaduct (approximately 17,400 yards) for the sum of $1.85 per square yard. This includes one inch yellow pine boards under same, F. O. B. cars Milwaukee, Wis., said blocks to be according to specifications furnished by the city engineer. Payment for the above to be made monthly as estimates of engineer in charge of work are allowed by the common council and approved by the mayor for deliveries made during the previous month, you to pay the freight and deduct same from the settlement.

"*Guarantee.*

"We further agree to guarantee that these blocks will be acceptable to the city engineer and we agree to furnish in the above named street, free of cost to you, for a period of five years dating from the completion and acceptance of said street and work, new blocks to replace any that do not stand the usual and ordinary wear; provided, however, that this guarantee is conditioned in every way upon the pavement being laid properly and in accordance with the contract and specifications governing the said work. We also agree for you to hold back ten per cent. of our contract price for a period of five years, you to pay us four per cent. interest annually on same, to faithfully fulfil the above proposition.

"TERRE HAUTE CREOSOTING COMPANY,
"Wm. Erler, Mgr.

"I accept the above proposition.
"JAMES O'DONNELL."

The issues raised by the pleadings and litigated on the trial concerned the amount earned under the contract. The claim of the plaintiff was that the number of yards of paving material furnished should be determined by measurement at the time of the delivery. The claim on the part of the defendant was that it should be determined by the city engineer in charge of the work of paving the viaduct, measuring the surface of the completed work. By plaintiff's method the sum earned under the contract as stated in the complaint was $34,084.45, and the amount collectible, after deducting the sum retainable as per agreement, $4,020.41. By the defendant's method of measurement the amount earned under

the contract, as stated in the answer, was $32,188.76, the amount retainable under the contract $3,218.87, and the amount paid $26,655.49. There was a counterclaim and reply thereto, but the issues thus formed were withdrawn so far as the claims of the defendant were not admitted.

The cause was tried by the court, resulting in a construction of the contract according to plaintiff's view, and findings to the effect that 17,740.4 yards of paving blocks and 16,300½ yards of boards were furnished; that the amount earned thereby was $32,257.25; that the material furnished was accepted upon arrival at Milwaukee; that no part thereof was returned; that thereby defendant became liable to pay therefor according to the contract; and that he was entitled to credit for payments made, and some items of damages, aggregating $27,180.10, leaving a balance due and collectible, after deducting $3,225.72, retainable under the contract, of $1,932.72, and interest from July 8, 1903, and interest on a further sum not paid when due to that date, making in all $2,189.71, for which judgment was ordered and entered. The defendant appeals.

For the appellant there was a brief by *Dorr & Gregory,* attorneys, and *Adolph Huebschmann,* of counsel, and oral argument by *Mr. Huebschmann.*

For respondent there was a brief by *Hoyt, Doe, Umbreit & Olwell,* and oral argument by *J. B. Doe.*

MARSHALL, J. The essential assignments of error refer to whether the trial court correctly construed the contract. If there were error in that, numerous other errors were committed in rejecting evidence offered by appellant, and the final conclusion is erroneous.

It seems that controlling significance was given by the learned circuit judge to that feature of the contract indicating that the title to the paving material was to and did pass to appellant upon his accepting the same from the car

at Milwaukee. It was to be furnished at $1.85 per square yard "F. O. B. cars at Milwaukee, Wis." The quoted term unmistakably shows that the parties intended a change of title upon delivery. *Vogt v. Schienebeck,* 122 Wis. 491, 100 N. W. 820. It does not follow necessarily, however, that the amount to be paid for the material became then fixed. The general rule is that as between vendor and vendee the title to the subject of the transaction passes from the one to the other when the terms of sale are agreed upon and everything the vendee has to do with the matter has been done. *Abraham v. Karger,* 100 Wis. 387, 76 N. W. 330. Nothing appearing to the contrary, it is presumed that the price to be paid for the property is to be fixed theretofore, but it is perfectly competent for parties to so contract that the title shall pass to the vendee and the property may be taken and appropriated by him, and the amount he shall pay be subsequently determined. *Sewell v. Eaton,* 6 Wis. 490; *Morrow v. Campbell,* 30 Wis. 90. Whenever it is apparent that the parties intended at the inception of their contract of sale that the title to the subject thereof should pass to the vendee and the measurement thereof be thereafter made, and the amount to be paid therefor determined according thereto, that will govern. *Gill v. Benjamin,* 64 Wis. 362, 25 N. W. 445; *McConnell v. Hughes,* 29 Wis. 537; *Fletcher v. Ingram,* 46 Wis. 191, 50 N. W. 424; *Pike v. Vaughn,* 39 Wis. 499; *Smith v. Wis. Inv. Co.* 114 Wis. 151, 89 N. W. 829.

So it was a mistake to suppose that merely because the title to the paving material passed to appellant upon his accepting the same from the car that then was necessarily the time to ascertain the amount to be paid therefor, and that nothing having been done in that regard by the vendee he was governed by the measurement made by the vendor. The matter wholly turns on the intention of the parties expressed in the contract.

It seems that if the learned trial court had viewed the

writing in the light of the foregoing a different conclusion would readily have been reached than the one complained of. It seems to us quite plain that the contracting parties intended that the measurement of the paving material should be after it was laid on the viaduct according to the specifications covering the work. Respondent agreed to furnish "enough" of such material "to pave 16th Street Viaduct" at $1.85 per square yard. The term "enough," etc., in connection with that which is a matter of common knowledge, viz.: that lumber is generally sold by the square foot, and that in laying such a pavement as was contemplated in this case there is necessarily some waste, the amount of which cannot be accurately determined in advance, suggests very forcibly that the quantity to be paid for was to be determined by measurement of the completed work. That is rendered unmistakable, we may well say, by the term "payment for the above to be made monthly as estimates of engineer in charge of the work are allowed by the common council and approved by the mayor for deliveries made during the previous month, you to pay the freight and deduct same from settlement." If payments were to be made according to measurements of material at the time of the delivery there was no occasion whatever for the quoted clause. It is significant only when regarded as prescribing the manner the amount to be paid should be determined and the time when payments should be made. It shows pretty clearly, if not beyond room for reasonable controversy, that the idea which the contracting parties had in mind was that the vendor should be paid on the measurements forming the standard for appellant's compensation, the measurements made as the work progressed to be regarded as estimates, and the exact amount of the material furnished to be determined by measuring the entire work at the completion thereof, final settlement to be then made, and the advances for freight allowed to the vendee.

The foregoing renders further discussion of the case un-

necessary. It requires a reversal of the judgment, and cause to be remanded with directions to the trial court to take such further evidence as may be necessary to a determination of the correct amount of paving material to be credited to the respondent, and after determining that fact to thereon, and on those facts heretofore found, not disturbed on this appeal, render the proper judgment.

By the Court.—So ordered.

EGGEN, Appellant, vs. FOX, Respondent.

March 16—April 5, 1905.

New trial: Discretion: Appeal: Dismissal.

1. The ordering of a new trial on its own motion is a matter within the discretion of the trial court, and is not to be reviewed on appeal unless there was an abuse of such discretion.
2. Where the specific grounds upon which a new trial was ordered on the trial court's own motion do not appear, it is presumed that the court acted within its discretionary power.
3. An appeal from a discretionary order will be dismissed if there was no abuse of discretion.

APPEAL from an order of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Dismissed.*

This action was originally commenced in justice's court to recover for a breach of warranty on the sale of the judgment described in the pleadings. An appeal was taken from the judgment rendered in justice's court to the superior court of Milwaukee county. In superior court defendant was permitted to amend her answer by way of counterclaim, in which she charged that her signature to the instrument of assignment was procured by misrepresentation as to its contents; that she was thereby misled and induced to execute the assignment containing the provision "and hereby guarantee

that no part of such judgment has ever been [paid];" and that such stipulation in the assignment is contrary to the express agreement of the sale of the judgment to plaintiff. She therefore prayed that the assignment as written be reformed by striking out the clause of warranty contained therein so as to conform to the agreement actually made, and, after such reformation, that the complaint be dismissed.

The case was tried in the superior court before the court and jury. The court determined to take the advice of the jury upon the facts involved upon the issue of reformation of the instrument of assignment. Evidence was produced by both parties upon the issues of the case, and the advice of the jury was taken by the court thereon. Plaintiff and defendant respectively moved for judgment. Under the evidence and the special question of fact found by the jury the court denied each of these motions, and thereupon, upon its own motion, ordered a new trial of the case. This is an appeal from the order granting a new trial.

J. A. Eggen, for the appellant.

For the respondent the cause was submitted on the brief of *McElroy & Eschweiler.*

SIEBECKER, J. The only question presented on this appeal is whether the court ruled correctly in ordering a new trial of the case upon its own motion. The power of the court to grant a new trial is unquestioned. The only question for consideration is, Did the court act properly in ordering the new trial? Such action by the court is clearly within the field of discretion, and is not to be reviewed on appeal unless it appears that there was an abuse of this discretion. The court is presumed to have taken the course it did because it deemed it necessary in furtherance of justice, under the circumstances presented by the case. He had a full knowledge of the state of the case from which he was required to determine whether a due regard for the rights of the parties

and the justice of the cause required that a new trial should be had. It is contended that the court mistook the law applicable to the case, in directing a new trial, in that it appears that the defendant was not entitled to any relief under the pleadings and the evidence adduced. There is nothing in the case to indicate the specific grounds upon which the order was made, and, under this state of the record, it is presumed that the court acted within its discretionary power. Under the pleadings an issue of fact is presented, which must be determined upon evidence before a final decision of the case can be made. A review of the evidence can serve no useful purpose, since the issue of fact must be determined upon such evidence as may be produced upon a retrial. We are persuaded that there was no abuse of discretion in granting a new trial. *Van Valkenburgh v. Hoskins,* 7 Wis. 496; *R. Connor Co. v. Goodwillie,* 120 Wis. 603, 98 N. W. 528; *Maxon v. Gates,* 112 Wis. 196, 88 N. W. 54. This being an appeal from a discretionary order, and there being no abuse of discretion, it must be dismissed. *McElroy v. Minn. P. H. Co.* 109 Wis. 116, 85 N. W. 119; *R. Connor Co. v. Goodwillie, supra.*

By the Court.—The appeal is dismissed.

KRUSE and wife, Respondents, vs. KOELZER and wife, Appellants.

March 16—April 5, 1905.

Reformation of deed: Mistake: Acceptance: Laches: Antecedent contract: Parol evidence: Practical construction by parties.

1. To warrant the reformation of a written instrument on the ground of mistake it must be clearly shown that the mistake was mutual and that both parties intended to make an instrument different from the one sought to be reformed.

2. Thus, where the purchasers of part of a lot expected to get seventy-five feet in depth, all parties supposing that the lot was 150 feet deep, as it was shown on a plat, but the vendors only agreed to sell one half and intended to and did in fact convey only one half, there was no mistake warranting reformation of the deed so that it should convey seventy-five feet, although it was found that the lot was in fact less than 150 feet in depth.
3. The purchasers' acceptance of the deed in such a case, with nothing to prevent their being chargeable with knowledge of its contents, and their acquiescence for a long time, during which the vendors had changed their position on the faith of the deed, would bar any right to a reformation, whatever were the facts as to the understanding between the parties with reference to the description of the land.
4. A receipt for earnest-money given by the agent who negotiated the sale, describing the property as seventy-five feet in depth, although his only authority was to sell one half, the vendors knowing nothing of this receipt until long after the execution of the deed, was not an antecedent contract admissible in evidence to explain the deed or to be construed with it.
5. Parol evidence is not admissible to explain or vary the terms of a conveyance of land.
6. Evidence of the acts of the parties is not admissible to show a practical construction of a deed, where its terms are not ambiguous or indefinite.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

This action was brought to reform a warranty deed from defendants to plaintiffs. The complaint alleges, in effect, that on the 1st day of April, 1902, plaintiffs and defendants negotiated and bargained the sale by defendants to plaintiffs of the south seventy-five feet of the east one-half of lot No. 9, in block No. 120, Second ward, city of Milwaukee, Milwaukee county, Wisconsin, being a lot twenty-five feet on Winnebago street by seventy-five feet deep on the west line and seventy-five feet deep on the east line, which premises defendants agreed to convey to plaintiffs for $6,500; that in pursuance of such agreement, on the 23d day of April, 1902, defendants executed and delivered to plaintiffs a deed, intending thereby to convey said premises, and received such

consideration; that plaintiffs recorded said deed, and believed it conveyed the premises above described; that by mistake of the defendants and the scrivener the premises were erroneously described as the south half of the east half of lot 9, block 120; that it is necessary that such deed be reformed in order to carry out the intention of the parties; that on discovery of said mistake plaintiffs requested defendants to correct the same. The answer is a general denial.

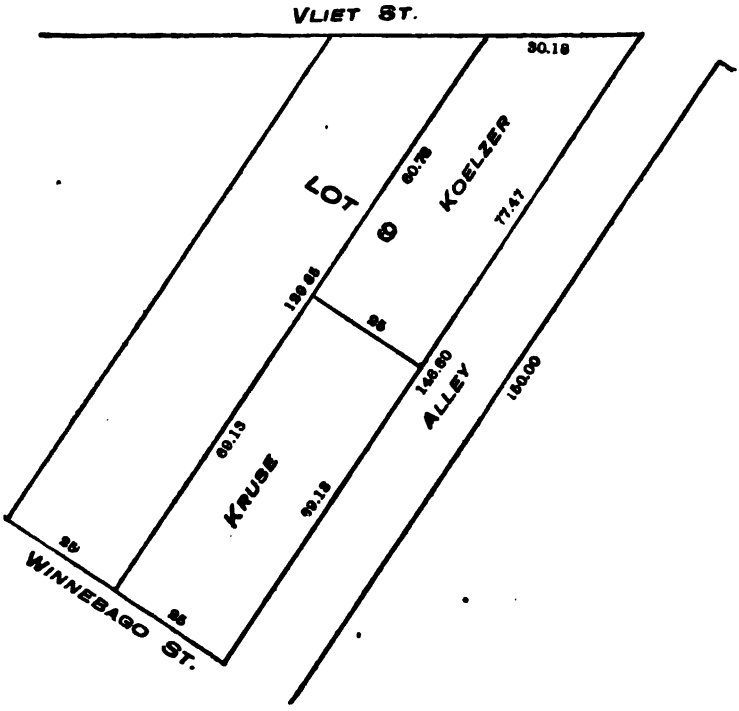
The action was tried, and the court below found that a mistake was made in the description and that the deed should be reformed according to the prayer of the complaint. Judgment was rendered in accordance with such finding, from which this appeal is taken.

For the appellants there was a brief by *Hoyt, Doe, Umbreit & Olwell,* and oral argument by *F. M. Hoyt.*

H. E. Georgi, for the respondents.

KERWIN, J. 1. The evidence of mistake on the part of the plaintiff is very meager. True, the plaintiff *William Kruse* testified that he stated he must have seventy-five feet for his business, but when he so stated defendant *Bernard Koelzer* made no reply, except that he would have seventy-five feet on the alley, and this upon the theory that, the lot being 150 feet on the alley, one half would give him seventy-five feet. Defendant *Bernard Koelzer* testified that he never agreed to sell seventy-five feet, or anything but the south half, and the plaintiff *William Kruse* does not testify positively that in any of the conversations had before the execution of the deed defendant *Bernard Koelzer* agreed to make the deed for the south seventy-five feet. It is true Ewens, real-estate agent, testified that it was understood plaintiff's property was to be seventy-five feet on the square. He further testified that defendant *Bernard Koelzer* asked who was to lose the angle on Vliet street, and Ewens said, it being on his side, he would have to lose it, to which said de-

fendant made no reply. Joseph Ewens, architect, testified *Kruse* said he had seventy-five feet on the east line owing to having sold seventy-five feet to *Kruse,* but he did not know how much he had on the west line. This evidence was con-



sistent with the theory that he had sold the south half to plaintiffs, because all parties understood at this time that the lot was 150 feet on the alley, as it appeared on the plat examined by the parties. The plaintiffs and defendants were mistaken as to the length of the lot, and this appears to be the mistake between the parties. It is quite clear that defendants did not intend to make any deed different from the one made. The evidence shows that defendants particularly examined the contents of the deed before it was signed, went to the office of the scrivener for that purpose an hour

before the appointed time, so as to be able to do so, and plaintiff *William Kruse* was present when the papers were signed. Now, it is quite clear defendants signed the deed they intended to sign; that there was no mistake on their part; and no fraud or other ground of equitable relief is claimed. The reformation is asked because of mistake, and, in order to warrant a court of equity in reforming a written instrument on the ground of mistake, the mistake must be mutual. It is not sufficient that plaintiffs were mistaken in the description; defendants must be also. It is well established that, to warrant a court of equity in reforming a written instrument on the ground of mistake, the evidence must be clear and convincing that the mistake was mutual and that both parties intended to make an instrument different from the one sought to be reformed. 3 Pomeroy, Eq. Jur. § 1376; *Meiswinkel v. St. Paul F. & M. Ins. Co.* 75 Wis. 147, 43 N. W. 669; *Harter v. Christoph,* 32 Wis. 245. The evidence is undisputed that defendants carefully examined the deed before they signed it, and knew what they were signing, and intended to make a deed of the south half of the lot in question, and it is not easy to see upon what theory the court found there was a mutual mistake.

It is doubtless true that plaintiffs expected to get seventy-five feet of the lot, but this not because of a different deed from the one executed, but because they understood the lot to be 150 feet long and that the deed they received would give them the quantity of land they expected. This is obvious from the evidence. One witness says: "*Q.* What was said as to the size of the lot? *A.* I think *Mr. Kruse* talked about his wanting seventy-five feet, and with the supposition that the lot being 150 feet deep, according to the map, why, there was no reason to have any question raised at all as to size." The parties were present when the deed was executed, and there is no evidence that they did not understand its contents. But even if the deed did not describe the

land intended to be conveyed, it was the plain duty of the plaintiffs to open their eyes and see it. They could not accept the deed, take possession of the property, sleep upon their rights, and allow defendants to act upon their acquiescence, and afterwards ask a court of equity to grant them relief from their own negligence. It is well settled that, where a party accepts a written instrument in consummation of an agreement entered into, it is his duty to know its contents, unless there be fraud or mistake of such a nature that he could not reasonably have informed himself when put upon inquiry. *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92 N. W. 246; *Van Beck v. Milbrath,* 118 Wis. 42, 94 N. W. 657; *Herbst v. Lowe,* 65 Wis. 316, 26 N. W. 751; *Sanger v. Dun,* 47 Wis. 615, 3 N. W. 388; *Fuller v. Madison M. Ins. Co.* 36 Wis. 599. Men, in their dealings with each other, cannot close their eyes to the means of knowledge equally accessible to themselves and those with whom they deal, and then ask courts to relieve them from the consequences of their lack of vigilance. *Mamlock v. Fairbanks,* 46 Wis. 415, 1 N. W. 167; *Dowagiac Mfg. Co. v. Schroeder,* 108 Wis. 109, 84 N. W. 14. Whatever be the facts concerning the agreement or understanding between the parties with reference to the description of the land, the facts and circumstances were such as to charge the plaintiffs with knowledge of the contents of their deed, and their acquiescence for so long a period of time, during which the defendants had changed their position on the faith of the deed, is sufficient to bar recovery in equity.

2. Counsel for respondents makes several contentions in his brief, which we will consider in their order. His first proposition is that if a deed be given in fulfilment of a contract, and there is doubt as to the meaning of its terms, the contract is admissible in evidence to explain the deed, and that the court should construe the two instruments together. In the case at bar there was no contract antecedent to the deed.

A receipt was given by Ewens, the agent who negotiated the sale, for a small payment to bind the bargain, some time before the execution of the deed. This receipt, which was signed by the agent, and its contents unknown to defendants, described the property as the south seventy-five feet. Defendants knew nothing of this receipt, and never saw it, until about a year after the execution of the deed, and the agent's only authority was to sell the south half of the lot.

Counsel further contends that deeds are an exception to the ordinary rule that written instruments are supposed to contain the whole contract and cannot be varied by parol; citing *Green v. Batson,* 71 Wis. 54, 36 N. W. 849; *Hahn v. Doolittle,* 18 Wis. 196; *Brown v. Johnson,* 115 Wis. 430, 91 N. W. 1016; *Hurlbert v. T. D. Kellogg L. & M. Co.* 115 Wis. 225, 91 N. W. 673; *Beebe v. Wis. M. L. Co.* 117 Wis. 328, 93 N. W. 1103. We think a careful examination of these cases will show that the rule enunciated there is not applicable here. *Green v. Batson, supra,* holds that, in an action to recover for balance of purchase price, it was competent to show false representations as to the quality of the lands; they being covered with snow at time of sale, and no examination could be made. So *Hahn v. Doolittle, supra,* holds that false representations at time of sale of note and mortgage, relied upon by purchaser of the security, may be shown. And in *Brown v. Johnson, supra,* the evidence was allowed upon the ground that it is permissible to show a deed absolute on its face a mortgage, when given as security for a debt. In *Hurlbert v. T. D. Kellogg L. & M. Co., supra,* the defense was fraud. At p. 228 (91 N. W. 674) WINSLOW, J., said:

"It is always competent to show by parol that a given contract was entered into relying upon fraudulent representations; and, when a written contract does not contain the entire agreement between the parties, it is competent to show by parol or by other writings executed at the same time what the balance of the agreement or transaction was."

It is very clear that these cases are not in point. Where parol evidence is admissible to contradict a written instrument on the ground of fraud, no reformation is necessary. The fraud opens the door for the evidence. It will be seen that the cases cited are no invasion of the general rule that parol evidence is not admissible to contradict or vary the terms of a written instrument. The plaintiffs' suit for reformation is not brought upon the theory that parol evidence is admissible to explain the deed, but upon the theory that it is not. If parol evidence were admissible to explain or vary the terms of the deed, or show that other lands were intended to be conveyed, the plaintiffs would have no standing in a court of equity for reformation.

Counsel also cites *Hill v. Priestly,* 52 N. Y. 635, to the point that, if a deed be indefinite or ambiguous, the acts of the parties are received as a practical construction of it; but here the deed is not ambiguous or indefinite. It is as plain as language can make it. Also *Sampson v. Mudge,* 13 Fed. 260, is cited on the point that a mistake of the scrivener in drawing deed, whereby he fails to carry out the previous intention of the parties, may be corrected in equity. But, as before observed, in the case at bar the evidence fails to show any mistake of the scrivener.

We must therefore hold that the court below erred in holding that the plaintiffs were entitled to reformation.

By the Court.—The judgment of the court below is reversed, and the cause remanded with instructions to dismiss the complaint.

FERGUSON, Administrator, Appellant, vs. WOODS, Respondent—(MCINTYRE'S ESTATE).

March 16—April 5, 1905.

Executors and administrators: Judgment against, for costs: Priority of payment.

Where an administrator was duly authorized, under secs. 3811, 3813, Stats. 1898, to bring an action to recover assets alleged to be a part of the estate of his decedent, and a judgment was recovered against him therein for costs and disbursements, such costs and disbursements were a part of the necessary expenses of administration, within the meaning of sec. 3852, payable out of the assets of the estate, with priority over general debts of the decedent.

APPEAL from a judgment of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Affirmed.*

This is an appeal from a judgment of the circuit court requiring *H. T. Ferguson,* as administrator of the estate of Mary McIntyre, deceased, to pay a judgment against him as such administrator and in favor of *Mary Ann Woods.* Issue being joined and trial had, the circuit court found, as matters of fact, in effect: (1) That May 24, 1901, *H. T. Ferguson* was appointed by the county court special administrator of the estate of Mary McIntyre, deceased, and qualified as such; (2) that May 31, 1901, by order of the county court, he was authorized to commence suit against *Mary Ann Woods* to recover certain assets alleged to belong to the said estate; (3) that June 11, 1901, *Ferguson,* as such administrator, commenced such suit in the circuit court; (4) that July 6, 1901, *Ferguson* was appointed administrator of the estate and qualified as such, and has since acted as such administrator; (5) that February 5, 1903, that action was tried in the circuit court, and at the close thereof was dismissed, and judgment was entered in the circuit court in favor of *Mary Ann Woods* for her costs and disbursements

therein, taxed at $121.85, and that she recover the same against such administrator; (6) that August 18, 1903, an order was served on *Ferguson* requiring him to show cause why the amount of that judgment should not be paid out of the estate as part of the expenses of administration; (7) that November 11, 1903, that judgment was certified by the circuit court to the county court; (8) that November 11, 1903, *Ferguson* answered such order to show cause in the county court, and upon the hearing in that court it was adjudged that the amount of such judgment be paid to *Mary Ann Woods,* or her attorney, out of the estate, as part of the expenses of administration; (9) that *Ferguson,* as such administrator, appealed therefrom to the circuit court.

And as conclusions of law the court found, in effect, that the judgment for costs recovered by *Mary Ann Woods* against *H. T. Ferguson,* as administrator of the estate of Mary McIntyre, deceased, in the circuit court, is entitled to be paid out of the estate of Mary McIntyre, deceased, as a part of the expense of administration; that the order of the county court appealed from be, and the same was thereby, affirmed, and judgment was ordered to be entered thereon accordingly, with costs in favor of the said *Mary Ann Woods.* From the judgment entered thereon accordingly the administrator, *Ferguson,* appeals.

For the appellant there was a brief by *O. W. Bow,* and oral argument by *H. T. Ferguson.* They contended, *inter alia,* that under sec. 3847, Stats. 1898, the judgment against the administrator should be "paid as other claims duly allowed against the estate." This section and the two preceding it are clearly intended to provide for the payment of judgments rendered against administrators in all actions defended or prosecuted by them. All ordinary remedies for the collection of such judgments have been abolished. See secs. 3256 and 2932, Stats. 1898.

For the respondent there was a brief by *Fiebing & Killilea,* and oral argument by *W. F. Adams.*

CASSODAY, C. J. This court has repeatedly declared that the right to and liability for costs in any action or proceeding in this state is regulated and governed entirely by the statutes. *In re Carroll's Will,* 53 Wis. 228, 233, 10 N. W. 375; *Wis. Cent. Co. v. Kneale,* 79 Wis. 89, 95, 48 N. W. 248; *Nash v. Meggett,* 89 Wis. 486, 494, 61 N. W. 283; *Estate of Cole,* 102 Wis. 1, 11, 78 N. W. 402; *Dowling v. Fire Asso.* 102 Wis. 383, 386, 78 N. W. 581; *In re Donges's Estate,* 103 Wis. 497, 513, 79 N. W. 786; *In re Will of Healy,* 108 Wis. 632, 84 N. W. 835; *McMahon v. Snyder,* 117 Wis. 463, 467, 94 N. W. 351. Pursuant to the statutes, such administrator was expressly authorized by the county court to commence the action he brought in the circuit court to recover certain assets alleged to be a part of the estate of Mary McIntyre, deceased. Secs. 3811, 3813, Stats. 1898; *Jones v. Graham,* 80 Wis. 6, 10, 49 N. W. 122. But the administrator was beaten in that action, and judgment was entered therein in favor of *Mary Ann Woods,* dismissing the action and for costs and disbursements, as mentioned in the foregoing statement, to be recovered from *Ferguson* as such administrator. The entry of such judgment seems to have been in strict accordance with the statute which provides, in effect, that in an action prosecuted or defended by an administrator, "unless otherwise specially provided, costs shall be recovered as in an action by and against a person prosecuting or defending in his own right; but such costs shall be chargeable only upon or collected of the estate, fund or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant personally, for mismanagement or bad faith in such action or defense." Sec. 2932, Stats. 1898. Here, there is no claim of any "mismanagement or bad faith," much less any direction of the

court that the administrator should be personally liable for such costs. *Wiesmann v. Brighton,* 83 Wis. 550, 53 N. W. 911. Another section of the statute relating to proceedings in county courts provides that:

"If the assets received by the executor or administrator, and which can be appropriated to the payment of debts, shall not be sufficient he shall, *after paying necessary expenses of administration,* pay the debts against the estate in the" order therein prescribed. Sec. 3852, Stats. 1898.

In construing this section of the statute it was said by the late Justice PINNEY, speaking for the court, that:

"Where the administrator makes payment of a claim for proper and necessary counsel fees or other proper expenses of administration, he can charge the same in his account and have it allowed at a reasonable amount and paid out of the assets of the estate in his hands, and such claim will have priority over the general debts of the decedent." *Miller v. Tracy,* 86 Wis. 330, 334, 56 N. W. 866; *Opitz v. Karel,* 118 Wis. 527, 536, 95 N. W. 948.

Since there was no "mismanagement" nor "bad faith in such action" against *Mary Ann Woods,* it follows that the costs incurred in that action were "necessary expenses of administration" within the meaning of the section last cited. Certainly, such costs were not a claim against Mary McIntyre within the meaning of sec. 3838, Stats. 1898. *Brown v. McGee's Estate,* 117 Wis. 389, 94 N. W. 363. Nor can that action be regarded as one pending at the time of the death of Mary McIntyre, within the meaning of secs. 3846, 3847, as claimed by counsel. The judgment is supported by the findings, and the findings are sustained by the evidence.

By the Court.—The judgment of the circuit court is affirmed.

THE STATE EX REL. HANLON, Respondent, vs. RUSSELL, President, and others, Appellants.

March 16—April 5, 1905.

Municipal corporations: Lighting franchise: Submission to electors: Petition.

Under sec. 959—52, Stats. 1898 (providing that applications for certain franchises shall be submitted to the electors of the city or village if such submission is requested by a petition "signed by at least twenty per cent. of the electors of such city or village, as appears by the poll list of the last general election"), the petition must be signed by twenty per cent. of the electors whose names appear on such poll list.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

This is an action of *mandamus,* brought on the relation of a taxpayer of the village of West Allis against the village officers to compel the submission of a certain gas franchise to the vote of the people, under sec. 959—52, Stats. 1898. There was no material dispute as to the facts, which were, in substance, as follows:

On the 21st of December, 1903, the West Allis Gas Company, a corporation, applied to the village board of West Allis for a franchise to lay and operate gas mains in the streets of the village, and submitted a copy of a proposed ordinance granting such franchise. The application and the proposed ordinance were published in the official newspaper of the village, the first publication being in the paper dated January 2, 1904, but in fact issued on the evening of December 31, 1903; and the second publication being in the issue dated January 9, 1904, but appearing January 8, 1904. On January 15, 1904, a petition, signed by the relator and 163 other electors of the village of West Allis, was filed with the village clerk, demanding that the proposed

ordinance be submitted to a vote of the people. The village board at their next meeting, held on January 18, 1904, refused to submit the ordinance to a vote of the people, whereupon this action was brought. It further appeared that at the general election held in November, 1902, 340 votes in all were cast in the village of West Allis, as shown by the poll list of that election; that said petition for referendum was not signed by twenty per cent. of the voters whose names appeared upon said poll list, but that said petition was signed by 164 electors, which was greatly more than twenty per cent. of the number of names upon the poll list.

Upon these facts the court made findings and entered judgment directing the issuance of a peremptory writ of *mandamus,* and the defendants appeal.

For the appellants there was a brief by *Miller, Noyes & Miller,* and oral argument by *G. H. Noyes.*

For the respondent there was a brief by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Jackson B. Kemper,* of counsel, and oral argument by *Jackson B. Kemper.*

WINSLOW, J. The statute (sec. 959—52, Stats. 1898) requires that the petition for referendum shall be signed by "at least twenty per cent. of the electors of such city or village, as appears by the poll list of the last general election." It is conceded that, if this means that the petition shall be signed by twenty per cent. of the electors whose names appear on the poll list, then the petition in this case was not sufficient, but, if it means twenty per cent. of the number of electors upon the last poll list, then the petition was sufficient. This is the only question which we find it necessary to consider. Little or no aid can be obtained from authorities, although two cases in this court, arising under somewhat similar statutes, are cited, viz., *La Londe v. Barron Co.* 80 Wis. 380, 49 N. W. 960, and *Bush v. State ex rel. Boyle,* 100 Wis. 549, 76 N. W. 606. It is simply a question of

construction of the language used. Had the statute said twenty per cent. of the electors appearing by the poll list, we suppose there would be little or no contention as to the meaning. All would construe it as meaning twenty per cent. of the very electors appearing on that list. The words used are "twenty per cent. of the electors . . . as appears by the poll list." We think this must be construed in the same way. The legislative idea evidently was to provide a definite and certain means of ascertaining whether the required number of petitioners had signed. By providing that the petition should be signed by twenty per cent. of the persons whose names appeared on the poll list all difficulty was removed. Inspection of the petition, inspection of the poll list, and enumeration of the names common to both, settled the question. This seems a very reasonable method, and it is a method frequently adopted. The presumption is that there will be little change in the body of the electorate between two general elections.

By the Court.—Judgment reversed, and action remanded with directions to deny the writ and dismiss the action.

PECK, Appellant, vs. PECK, Respondent.

March 16—April 5, 1905.

Guaranty: Consideration: Evidence: Special verdict: Instructions to jury: Immaterial errors.

1. Permitting defendant to testify generally that she did not receive any consideration for signing the guaranty in suit, if error, was not prejudicial where, without objection, she denied specifically the existence of the agreement which constituted the only consideration claimed.
2. The question being whether a residuary legatee guaranteed payment of the principal of a note of the testator in consideration of the payee's agreement not to present the note as a claim against the estate, evidence that the testator left no estate

from which the note could be paid, and that the legatee knew that fact before the making of the alleged guaranty, was admissible.

3. The question whether defendant, by payments, had ratified a change made in the contract of guaranty after she signed the same, was not a proper question for a special verdict, since the ratification, if any, would be merely evidentiary, bearing on the question whether the agreement relied upon as the consideration to support the guaranty was made.

4. Plaintiff testified that at a time when only he and defendant were present the guaranty "was written and signed by" defendant. It was a conceded fact that the guaranty itself, above defendant's signature, was not in her handwriting. *Held*, that it was not a prejudicial error for the court, in charging the jury, to state that plaintiff testified that he wrote the guaranty.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Action to recover on an alleged contract of guaranty. It was claimed in the complaint that on March 19, 1890, O. D. Peck delivered his promissory note to plaintiff, obligating himself to pay him one year from the date thereof $2,000, with interest thereon from such date at the rate of ten per cent.; that on November 14, 1895, defendant signed a writing thereon guaranteeing the principal thereof, such writing being in these words: "For value received I hereby guarantee the payment of the principal on the within note;" that at the time of the commencement of this action there was due of such principal over and above payments by defendant $1,550. Judgment was demanded accordingly. Defendant answered, among other things, that she signed her name on the back of the note at the time alleged in the complaint, but that she had neither knowledge nor information sufficient to form a belief as to whether the alleged written guaranty was then thereon or not; and in any event that there was no consideration whatever to support it.

There was evidence to the effect that there was a writing on the note of some sort when defendant signed her name thereon, but as to whether it included the words "for value

received" the evidence was conflicting. The evidence was further to the effect that the maker of the note died testate prior to the signing of the guaranty; that defendant was his residuary legatee; that subsequent to her signing the guaranty she called at the bank where the note was left for collection and made several payments thereon; and that there was no consideration to support the guaranty, unless it was in that in consideration thereof plaintiff agreed not to file any claim on the note against the estate of the maker. As to whether there was such an agreement the evidence was in conflict. The jury found specifically in favor of the defendant on both of such disputed matters, and thereon judgment was rendered for the defendant, from which plaintiff appealed.

For the appellant there was a brief by *A. G. Weissert,* attorney, and *M. H. Eaton* and *Frederick J. Eaton,* of counsel, and oral argument by *L. K. Eaton.*

For the respondent there was a brief by *Felker, Stewart & McDonald,* and oral argument by *F. C. Stewart.*

MARSHALL, J. Respondent was permitted to testify generally in answer to a direct question that she did not receive any consideration for signing the guaranty. We are unable to see how, under any reasonable view of the case, appellant was prejudiced thereby, even if the question were improper, since there was no claim made that any consideration was rendered for the guaranty, unless as such appellant agreed not to file any claim against the estate of O. D. Peck, deceased, which was denied by respondent by evidence not objected to or objectionable.

Evidence on the part of respondent was admitted, under objection, tending to show that when she signed the guaranty her rights as residuary legatee of O. D. Peck were valueless,—as bearing on the probability of whether she acted under the circumstances testified to by appellant. We can-

not agree with the latter's counsel that such evidence was immaterial. There was a square conflict between him and respondent as to whether the alleged agreement was made. It was perfectly obvious that she had no financial reason for signing the guaranty, unless she at least supposed she had a subsisting interest in the estate of O. D. Peck, deceased, to be conserved thereby. It was quite unnatural on the face of things for her to bind herself, without consideration, to pay the debt of the deceased. In that view evidence of facts inconsistent with the making of the disputed contract was perfectly proper upon elementary principles. True, if appellant supposed she had an interest in the estate of O. D. Peck, deceased, which would be conserved by making such a contract as the one claimed, it was immaterial whether she had such interest or not. That is as far as the authorities go, cited to our attention by appellant on this branch of the case. The evidence objected to, on the whole, was not only to the effect that Peck left no estate out of which the note could have been paid, but that respondent knew that fact long before the making of the guaranty, and before he died.

Complaint is made because the court refused to require the jury to determine, in case they found in respondent's favor that the words "for value received" were not on the note when she signed it, whether after she knew of the addition thereto she ratified the same. The only claim of appellant on that point was that she, with knowledge of the change in the writing, if there were such change, made payments thereon. Suppose she did and that the making thereof ratified any change theretofore in the guaranty, it was a mere circumstance bearing on the question of whether the contract was made, relied upon as the consideration to support the guaranty. Being a mere evidentiary matter, not a fact in issue under the pleadings, it was not the proper subject of a question for the special verdict.

The court by mistake said to the jury in instructions as to the special questions, "Mr. Peck testifies that he wrote the guaranty on the back of the note." He did not use those words, but did say that after the agreement was written the guaranty was signed by *Mrs. Lucinda W. Peck.* It is conceded, as we understand it, and as the fact appears to be from the evidence without room for reasonable controversy, that the writing above respondent's signature upon the note was not in her hand. According to plaintiff's evidence it was written when only he and respondent were present. So the reasonable meaning of his statement that the guaranty "was written and signed by *Mrs. Lucinda W. Peck,*" is that the guaranty was written by him and signed by her. That is the only construction of his evidence that will avoid viewing it so as to convict him of having testified wilfully false. While he did not use the words which the court said he did, clearly he used words of equivalent meaning.

The foregoing covers all the matters referred to by counsel for appellant as grounds for a reversal. The record appears to be free from any prejudicial error.

By the Court.—The judgment is affirmed.

FABER, Respondent, vs. C. REISS COAL COMPANY, Appellant.

March 17—April 5, 1905.

Master and servant: Personal injury: Assumption of risk: Expert testimony: Examination of jurors: Pecuniary interest: Remarks of counsel: Prejudicial error.

1. Where an employee engaged in pushing tram cars on an elevated platform at a coal dock must, if he gave even slight attention to his surroundings, have observed that there was no railing on

the edge of the platform and whether the platform was sufficiently lighted at night, his continuance in the service was an assumption of the risks incident thereto arising from the negligence, if any, of the employer in failing to provide a railing or to furnish sufficient light.

2. Questions, asked of medical experts, as to whether or not injuries to plaintiff's skull and to one of his eyes were *likely* to result in recurrent troubles, or were *apt* to affect injuriously the other eye, were not improper as being conjectural.

3. Plaintiff's counsel having suggested to the court that an insurance company was pecuniarily interested in the outcome of an action for personal injuries, it was proper to inquire of a juror, on his *voir dire*, whether or not he was a stockholder in that insurance company.

4. A statement by counsel for the plaintiff that an insurance company had undertaken to pay any judgment recovered against defendant in the action, made in the presence of jurors in the course of a colloquy between the court and counsel on both sides respecting a question asked of a juror upon his *voir dire*, is *held*, under all the circumstances and in view of the instructions to the jury to disregard any such statements, not to have constituted prejudicial error.

APPEAL from a judgment of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

This is an appeal from a judgment rendered on a special verdict in an action for damages which plaintiff alleges he sustained through defendant's negligence. Defendant is a corporation engaged in the coal business at Sheboygan, Wisconsin. In conducting its business it maintains coal docks in that city, located on the river's edge, facilitating the business of transferring coal from boats to its docks. At the time of the accident, plaintiff, thirty-one years of age, was possessed of good health, and had theretofore been engaged in manual labor. The accident occurred on May 18, 1903. At this time plaintiff was in the employ of the defendant as a common laborer on defendant's dock No. 2. This dock covers about one block in area, and has a platform extending east and west along about two thirds of its northerly side. The platform is about sixteen feet in width and about twenty-

eight feet above the dock floor, and is covered by a roof from six to six and a half feet above the platform. This platform is inclosed on the north or river side and partly on the other side. It has a break or angle in its north side and a corresponding one in its south side, owing to the fact that it is built so as to conform to the river line. On the platform are tracks on which are run the tram cars used in conveying coal from hoppers located on the north side. The coal is hoisted to the hoppers from boats, and thence conveyed in the cars over this track on the platform and tramways extending above the dock floors where the coal is stored. These tramways are so narrow that but one person can pass over them with the tram cars to the place where they are emptied and thence returned to the platform. Any platform along the tramways would interfere with the dumping of the coal from the cars onto the dock.

Plaintiff on the day in question had been delivering coal about the city until 5 o'clock in the afternoon, at which time he went to work on this platform. He and one Mr. Eicher worked together running a tram car, which was being loaded at the hopper located farthest east. After the car was loaded they pushed it along the track on the platform, and from there they would alternate in taking the loaded tram car over the tram track, emptying it and returning it to the platform for the next loading, when the whole operation would be repeated. Plaintiff and Eicher worked there until 6 o'clock, when they took thirty minutes intermission for supper, and at half past 6 resumed their work and continued it up to the time of the accident.

Plaintiff had helped load the car and push it to the edge of the platform for Mr. Eicher to take out on the tramway to dump. He then started to pass along the platform to get a drink of water from near the power house at the western part of the platform. In doing so he started to walk westward along the track, but, meeting another loaded car, he

turned off and stepped to the side of the track and then attempted to cross another track. While in the act of stepping over the second track he tripped, pitched forward over the edge of the platform at the angle or break therein, and fell to the dock floor below, receiving serious injuries, namely, the breaking of the bones of his arm and jaw and the blinding of one of his eyes.

Plaintiff had been in the employ of the defendant on two different occasions prior to the accident, and for some time prior thereto, but he had never been engaged at work on the platform before he went there at 5 o'clock on that day. He stated that he had observed the platform from the dock below; that he knew, in a general way, from such view, how it was constructed; and that he had seen men at work passing to and from the tramway and platform with the cars. The platform had no railing or guard along the edge at the open sides. It was lighted by incandescent electric lamps of sixteen candle power, suspended from the roof over the platform, and from twenty to thirty feet apart. There was no railing or guard at the point where plaintiff fell from the platform. He stated that there was a light near the edge of the platform at the point where he left Eicher and turned to go for a drink, and that there was a light from the roof within about a foot of the place where he tripped and fell, and that he could see the floor and track at that place, but that he did not see the edge of the platform.

Upon the evidence adduced the court submitted the case to the jury, and the following special verdict was rendered:

"(1) Was there any want of ordinary care and prudence on the part of the defendant in failing to properly light the premises where the plaintiff was injured? *A.* Yes.

"(2) Was there any want of ordinary care and prudence on the part of the defendant in failing to erect a barrier or railing at the point where the plaintiff fell off the platform? *A.* Yes.

"(3) If you answer either of the above questions 'Yes,'

then was such want of ordinary care and prudence the proximate cause of plaintiff's injury? *A.* Yes.

"(4) Were the injuries complained of, and received by the plaintiff, occasioned by an accident not occurring by reason of negligence on the part of either party? *A.* No.

"(5) Was the platform upon which the plaintiff was set to work on the 18th day of May, 1903, a reasonably safe place for him to perform his work, if in the exercise of ordinary care and prudence himself? *A.* No.

"(6) Did want of ordinary care on the part of the plaintiff contribute to produce the injury? *A.* No.

"(7) If the court should be of the opinion that the plaintiff is entitled to recover, at what amount do you assess his damages? *A.* $8,000."

Plaintiff was awarded judgment on this verdict. Defendant's motion to set aside the verdict and for a new trial was denied, and it now asks that the judgment be reversed upon the grounds assigned as error in the case.

For the appellant there was a brief by *Vilas, Vilas, Jenner & Freeman,* and oral argument by *W. F. Vilas* and *C. A. Vilas.* They contended, *inter alia,* that statements made by plaintiff's counsel before the jury, under the guise of inquiring as to their qualification to act as jurors, but in fact intended to convey to them the information that the defendant was insured against loss in the event of a recovery against it, were necessarily, and were intended to be, prejudicial to the defense, and the refusal of the court to withdraw the case from the jury in whose presence such statements had been made, and to discharge the jury and impanel a new one, constituted error which required a reversal of the judgment, notwithstanding the instruction to the jury to disregard such statements. *Lipschutz v. Ross,* 84 N. Y. Supp. 632; *Wildrick v. Moore,* 66 Hun, 630; *Cosselmon v. Dunfee,* 172 N. Y. 507; *Manigold v. Black River T. Co.* 81 N. Y. App. Div. 381.

Andrew Gilbertson, attorney, and *J. E. McMullen,* of counsel, for the respondent.

SIEBECKER, J. Plaintiff was awarded judgment upon a verdict which found that defendant failed in furnishing plaintiff a reasonably safe place to work, and that such negligence on defendant's part was the proximate cause of plaintiff's injuries and consequent damages. The specific negligence found by the jury was that defendant was guilty of a want of ordinary care in failing to properly light the platform and in failing to erect a barrier or railing along the edge of the platform, from which plaintiff fell while he was engaged as an employee in conducting defendant's business. The question is, Do these findings furnish a legal ground for a recovery by the plaintiff, in view of the undisputed facts and circumstances of the case? The facts material to a determination of this question appear in the foregoing statement of facts.

If plaintiff, as an intelligent and reasonably prudent man, ought to have observed the hazards of which he now complains, as incident to defendant's method of conducting its business, then no liability exists in his favor. He was a man of experience and was familiar with the kind and nature of the work he was required to perform. He was so situated and employed when he commenced working on the platform that slight attention to his surroundings would have informed him of the absence of a railing on the edge of the platform and of the danger incident to this condition. The very situation was suggestive of the danger to which he was exposed in performing his services. He is not relieved from the consequences of these assumed perils, under the condition of the dim and uncertain lighting of the platform as provided by the defendant. If the platform was insufficiently lighted, this was a condition within his immediate observation before the accident happened, and continuing in the service he is presumed to have had full knowledge of the danger arising therefrom.

The evidence shows that plaintiff had a general knowledge

of the way in which the platform was constructed and the uses to which it was put, before he went to work upon it. It is also apparent that, while working on the platform from and after 5 o'clock in the afternoon of the day of the accident, he ought, as an intelligent and reasonably prudent man, to have observed that no railing or guard had been placed along the edge of the open side of the platform. He also had equal opportunity with defendant to fully inform himself before the accident occurred whether the platform was properly lighted for conducting defendant's business in the evening. It is well-settled law that when a servant has knowledge of obvious dangers and perils incident to his employment, or if he, as an intelligent and reasonably prudent man, ought to have observed and to have known them under the circumstances of his service, then he assumes the hazards incident to the business as it is being conducted. The fact that defendant may have conducted its business negligently in the respects mentioned in no way renders this rule inapplicable to the case, for it had the legal right to conduct its business in its own way, though a different and more prudent method might have prevented the dangers complained of. This is for the reason that if a servant agrees to undertake employment in a business being conducted in a certain way, he thereby assumes all the obvious dangers and hazards. In support of this rule we cite the following cases: *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 73 N. W. 573; *Larsson v. McClure,* 95 Wis. 533, 70 N. W. 662; *Naylor v. C. & N. W. R. Co.* 53 Wis. 661, 11 N. W. 24. In view of the facts established by the evidence, the finding of the jury that defendant was guilty of a want of ordinary care in failing to provide a railing on the platform and sufficient lights to safely conduct the business, furnishes no ground of actionable negligence, for, if the platform was unsafe in these respects, any dangers incident thereto were assumed by the plaintiff when he continued in the service. *Abbot v. McCadden,* 81 Wis.

563, 51 N. W. 1079; *Thompson v. E. P. Allis Co.* 89 Wis. 523, 62 N. W. 527; *Moulton v. Gage,* 138 Mass. 390; *Taylor v. Carew Mfg. Co.* 140 Mass. 150, 3 N. E. 21; *Hughes v. W. & St. P. R. Co.* 27 Minn. 137, 6 N. W. 553; *Wannamaker v. Burke,* 111 Pa. St. 423, 2 Atl. 500; *Foley v. Jersey City E. L. Co.* 54 N. J. Law, 411, 24 Atl. 487.

Exception was taken to several hypothetical questions asked physicians testifying as to plaintiff's injuries. The questions were put to ascertain whether or not the injuries to the skull were "likely" to result in recurrent troubles, or were "apt" to affect injuriously the other eye. The questions were framed to elicit the probabilities of future suffering as consequences of existing conditions. In *Hallum v. Omro,* 122 Wis. 337, 99 N. W. 1051, the bearing of such testimony was fully considered and the practice of admitting it approved. Any further discussion at this time is therefore needless.

Error is assigned upon a question propounded to one of the jurors, and upon the remarks of the court and of plaintiff's counsel respecting the same. At the examination of the juror Plank, on the *voir dire,* he was asked by plaintiff's counsel whether he was a stockholder in the Travelers Insurance Company. Defendant's counsel objected to the question as incompetent, immaterial, and improper, whereupon the court remarked that there was nothing to show that the insurance company was interested in the defense, but, if it was interested, the inquiry was proper. To this statement of the court defendant excepted, and it was suggested to the court that such statements by the court or counsel in the presence of jurors had been held highly improper and prejudicial. This was followed by further colloquy between the court and the counsel for both parties, wherein plaintiff's counsel suggested that defendants were insured by this insurance company. Upon objection to this remark the court ruled: "That objection is well taken. Suppose that they were; then what?"

To this inquiry of the court plaintiff's counsel responded by stating that the insurance company had undertaken to pay any judgment that might be recovered and he therefore deemed it proper to press the inquiry. Further objection was made to this statement, which the court, in the first place, overruled, and then immediately withdrew the ruling, saying: "I think we are wasting time. I think the safest way is to sustain the objection."

It is urged that this proceeding was highly prejudicial, and that any verdict, therefore, rendered in plaintiff's favor should not be permitted to stand. The objection reaches two aspects of the proceeding: First. Was it proper to inquire of the juror whether or not he was a stockholder in the insurance company? The record shows that plaintiff's counsel suggested to the court that they had been informed that the insurance company had a pecuniary interest in the outcome of the action. Under such circumstances it was material and proper to inquire of the juror whether or not he was pecuniarily interested in the insurance company. If he was so interested, that would disqualify him, and full opportunity should be given a party to ascertain that fact from a juror in the case. This rule is so clearly sanctioned that citation of authorities is well-nigh unnecessary. 17 Am. & Eng. Ency. of Law (2d ed.) 1131; 1 Thompson, Trials, §§ 101, 102; *McLaughlin v. Louisville E. L. Co.* 100 Ky. 173, 37 S. W. 851. But complaint is made that the court and plaintiff's counsel trespassed beyond the proper limits of such an inquiry in making the statements above mentioned within the jurors' hearing, because such remarks are in their nature so prejudicial that all subsequent efforts to withdraw them from being considered by the jury were of necessity fruitless. In support of this contention we are cited to the case of *Lipschutz v. Ross,* 84 N. Y. Supp. 632. The exception urged in this case pertained to the remarks of counsel made before the jury in connection with an inquiry as to

their pecuniary interest in an insurance company under circumstances like those before us. The court held that such remarks constituted reversible error. We cannot give our unqualified assent to such a ruling. As stated above, parties have the legal right to ascertain whether or not jurors have a pecuniary interest in the litigation, and the exercise of this right necessarily authorizes them to elicit information from them on this subject. This, however, in no way gives counsel a license to communicate improper matters to the jurors, or to the court within their hearing, in connection with such inquiry. Such an examination should be held strictly within the limits of such right, and by direct question on the subject, unaccompanied by suggestion or comment from counsel which may convey improper and prejudicial information to jurors. In the instant case it appears that a colloquy took place between the court and counsel for both parties, following an objection by defendant's counsel to a proper question, and that all made statements concerning the subject matter of this exception. The line of demarcation between prejudicial and nonprejudicial remarks of this character cannot be readily drawn. Each case depends largely upon the circumstances by which they are elicited, and their probable effect upon the jurors. Taking all that occurred between the court and counsel for both parties, in connection with the court's rulings and subsequent instructions in regard thereto, we are led to the conclusion that the statement of counsel that the insurance company had insured defendant, made as it was in response to the court's suggestion, does not constitute reversible error.

Upon the ground first above stated the court should have granted defendant's motion for a new trial.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

MORGENROTH, Respondent, vs. SPENCER, Appellant.

March 17—April 5, 1905.

Husband and wife: Services of physician to wife living separate: Liability of husband: Evidence: Burden of proof: Wife as witness.

1. Upon the evidence in this case (stated in the opinion) it is *held* to have been a question for the jury whether defendant's wife was living separate and apart from him without his consent and without cause when the services in question were rendered to her.
2. Where a wife is living separate and apart from her husband without cause and without his consent, he is not liable for the services of a physician employed by her if he did not authorize such employment.
3. One who furnishes necessaries to a wife living separate and apart from her husband has the burden of showing that she is justifiably so living.
4. A wife is a competent witness against her husband in an action against him to recover for necessaries furnished to her.

APPEAL from a judgment of the circuit court for Green Lake county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

This action was commenced in justice's court to recover for professional services performed by plaintiff, a physician, for the wife of defendant. The complaint alleges the statutory qualifications as physician, and that, at defendant's special instance and request, plaintiff rendered the services sued for in treatment of defendant's wife; that such services were necessaries which defendant was bound to furnish and provide for his wife, the reasonable worth of which defendant promised to pay; and that such services were worth $34.75. The answer is a general denial.

The action was tried by the court and a jury, and, at the conclusion of plaintiff's evidence, defendant moved for a nonsuit, which was denied; and after the evidence was all in both parties moved for a directed verdict. The court re-

fused to direct a verdict for defendant, but directed a verdict for plaintiff. Judgment was rendered for plaintiff upon the verdict so directed, from which defendant appeals, and assigns the following errors: (1) The court erred in refusing to grant a nonsuit; (2) the court erred in refusing to direct a verdict for defendant; (3) the court erred in directing a verdict for plaintiff; (4) the court erred in admitting in evidence the deposition and testimony of the wife of defendant, Matilda Spencer.

Perry Niskern, for the appellant.

For the respondent there was a brief by *Geo. B. Heaney,* attorney, and *John J. Wood, Jr.,* of counsel, and oral argument by *Mr. Wood.*

KERWIN, J. 1. The question involved under the first, second, and third assignments of error is whether there was sufficient evidence to go to the jury upon the question of defendant's liability for plaintiff's bill for services. It appears from the evidence that defendant and his wife were married in 1888 and lived together until 1891, when she left him and remained away for seven or eight weeks on a farm occupied by her sister, in which she had an interest; that she returned and continued to live with defendant until 1900, when she again, at the request of her sister, Mrs. Dalby, and without objection on the part of defendant, went to the home of her sister; that when she left it was understood between defendant and his wife that she was to remain away two or three weeks, at the expiration of which time defendant went to Mrs. Dalby's to take his wife home, and she refused to go, saying she would never live with him again; that several times thereafter defendant requested her to return, but she refused and continued to live with her sister from January, 1900, until the trial of this action. During this time she was more or less out of health, and was occasionally visited by defendant, with whom she apparently was on friendly

relations—in June, 1900, going to a summer resort with him for a period of ten days, and at other times being visited by defendant, and going out on short visits with him. In January, 1900, defendant employed one Dr. Dodson, a physician, to treat his wife while at her sister's. In April, 1900, he wrote to her sister with whom she was staying, seeking to make some arrangement for her board; and during the same month he received a letter from his wife saying she was paying her own expenses. In March, 1903, the wife employed plaintiff as a physician to treat her. This employment was by the wife. Plaintiff never communicated with defendant about it. Just before the employment his wife told him she intended to employ plaintiff, and he objected, saying he would not pay him if she did.

While there is evidence on the part of the plaintiff tending to show that the wife was living apart from defendant with his consent and that he assented to the employment of plaintiff, yet it is not sufficient to justify the court in taking the case from the jury. From a careful examination we find there is ample evidence to support a finding to the effect that the wife of defendant was living separate and apart from her husband without his consent, and without cause, at the time the services were performed.

Plaintiff contends that the medicines and services furnished were necessaries which defendant was bound to provide, and it is doubtless upon this theory that the court below directed a verdict for plaintiff. When the defendant's wife deserted him without cause and continued to live apart from him without his consent, she did not take with her the defendant's credit. Her misconduct deprived her of power to bind her husband, and it was incumbent upon plaintiff to prove her authority, in order to make out a case against defendant. Schouler, Dom. Rel. § 69. *Prima facie,* a woman living separate and apart from her husband has no power to bind him, and it is incumbent upon the person furnishing

necessaries to a wife so living apart from her husband to show that she is so living for justifiable cause. *Sturbridge v. Franklin,* 160 Mass. 149, 35 N. E. 669. In the case at bar, if the wife of defendant was living separate and apart from him without cause and without his consent, and he did not authorize the employment of plaintiff, plaintiff cannot recover. *Sturtevant v. Starin,* 19 Wis. 268; *Brown v. Worden,* 39 Wis. 432. Upon the facts proved, it was a question for the jury to determine whether a rupture had taken place between husband and wife, of such a nature as to deprive her of authority to pledge his credit for necessaries supplied. *Crocker v. Napper,* 16 L. T. Rep. 295; *M'Cutchen v. M'Gahay,* 11 Johns. 281.

2. The fourth error assigned is that the court erred in admitting in evidence the deposition of Matilda Spencer, wife of defendant. The general rule is that the testimony of the wife is admissible in an action brought against the husband to recover for necessaries furnished to her. The testimony was therefore competent for such purpose, and is an exception to the general rule that the wife cannot be a witness for or against her husband. *Bach v. Parmely,* 35 Wis. 238.

It follows that the court erred in directing a verdict for the plaintiff.

By the Court.—The judgment of the court below is reversed, and the cause remanded for a new trial.

LUCAS, Respondent, vs. SHERIDAN and another, Appellants.

March 17—April 5, 1905.

Conversion of personal property: Sheriff: Offer to return: Injury to goods: Instructions to jury.

1. In an action against a sheriff and undersheriff for the conversion of personal property contained in a houseboat levied upon by the officers, it was not error to instruct the jury that if the

person placed in charge of the boat by the defendants forbade plaintiff to take the property, knowing or having been informed that plaintiff was the owner thereof, this was a denial by defendants of plaintiff's right and amounted to a conversion of the property.

2. The evidence in such action—tending to show, among other things, that after the levy upon the houseboat the defendants removed plaintiff's goods therefrom and put them upon the beach, but forbade the plaintiff to take them away; that while lying upon the beach the goods were rained upon and injured; and that two or three days later defendants offered to let plaintiff have the goods, but he then refused to take them because they had been spoiled—is *held* to sustain a verdict for the plaintiff.

3. It was not error to instruct the jury that if, after removal from the boat, the goods had been materially injured by rain or otherwise, or had been in part carried away by persons unknown, plaintiff was not bound to accept defendants' offer of return, but was entitled to recover the fair value of the property.

APPEAL from a judgment of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

This is an action for the wrongful and unlawful taking from the possession of the plaintiff, October 8, 1901, and carrying away and converting to their own use, of certain personal property described, of the alleged value of $550, for which amount the plaintiff claims damages and prays judgment. It appears from the record that on or about June 28, 1901, the plaintiff purchased from one Ed. Wheeler a certain houseboat, and upon that day obtained from him a bill of sale of the same. The complaint alleges that all of the personal property mentioned was at the time of such conversion within said houseboat and belonged to the plaintiff.

The answer alleges, in effect, that the defendants, as such sheriff and undersheriff, on October 8, 1901, by virtue of an execution against the goods and chattels of said Ed. Wheeler, issued by a justice of the peace October 4, 1901, upon a judgment entered before him in favor of one S. S. Willis and against Ed. Wheeler for $125.80 damages and costs,

seized and took possession of said houseboat as the property of said Ed. Wheeler; that at the time of such seizure the personal property mentioned was in said houseboat, of which the plaintiff claimed to be the owner; that at the time of such seizure the defendants notified the plaintiff that they had taken the houseboat by virtue of such execution and to remove therefrom any articles of personal property belonging to him, which the plaintiff then and there absolutely refused to do; that the defendants then and there caused all of such articles to be removed from the houseboat a short distance, to the bank of the river, and immediately thereafter notified the plaintiff of such removal and the place where such articles were located; and the defendants specifically deny that they carried away or converted to their own use any of said articles of personal property.

The issues so joined were tried, and at the close of the trial the jury returned a verdict against the defendants and in favor of the plaintiff, and assessed his damages at $487. From the judgment entered thereon for that amount of damages and $63.17 costs and disbursements the defendants appeal.

For the appellants there was a brief by *Reilly, Fellenz & Reilly,* attorneys, and *Maurice McKenna,* of counsel, and oral argument by *M. K. Reilly.*

T. L. Doyle, for the respondent.

Cassoday, C. J. The houseboat mentioned is not here in controversy. Counsel for the defendants concede that after they seized the houseboat as the property of Wheeler, as mentioned, it was replevied by the plaintiff, and that eleven days after such seizure it was found to be the property of the plaintiff in this action, and so was turned over to him by the defendants. The controversy here relates entirely to the articles of personal property belonging to the plaintiff and inside of the houseboat at the time of such seizure.

1. Exception is taken because, in charging the jury, the court, among other things, said:

"But if the man in charge of the boat knew that the plaintiff was the owner, or if at that time he was so informed by the plaintiff, and if the custodian then forbade the plaintiff to take the property in suit, such denial of the plaintiff's right was a denial by the defendants, and amounted to an assertion on their part of the control or dominion over this property, and was a conversion of it, in the law; and, if you find that such was the fact, then the plaintiff is entitled to recover of the defendants the full value of his property which was removed by them from the houseboat, unless you are satisfied that at a later date they offered to return to him the property, or offered to permit him to take it, and that it was then in substantially as good condition as it was in just before it was removed from the houseboat."

"It may be stated as a general rule that every act of control or dominion over personal property without the owner's authority, and in disregard and violation of his rights, is, in contemplation of law, a conversion." 28 Am. & Eng. Ency. of Law (2d ed.) 679. The decisions of this court are in harmony with such statement. *Dexter v. Cole,* 6 Wis. 319; *Thomas v. Steele,* 22 Wis. 207; *Dunham v. Converse,* 28 Wis. 306; *Tobin v. Deal,* 60 Wis. 87, 18 N. W. 634; *Brickley v. Walker,* 68 Wis. 563, 32 N. W. 773; *Boldewahn v. Schmidt,* 89 Wis. 444, 62 N. W. 177; *LaChapelle v. W. & B. S. Co.* 95 Wis. 518, 70 N. W. 589; *Cernahan v. Chrisler,* 107 Wis. 645, 647, 648, 83 N. W. 778. As stated in this last case by way of quotation from Cooley on Torts: "Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion." As said in that case by Mr. Justice BARDEEN, the test is whether the wrongdoer has exercised a dominion over the property in exclusion or in defiance of the plaintiff's rights. We must hold that there was no error in giving the instruction quoted.

2. We cannot say that the verdict of the jury is not sus-

tained by the evidence. *Adams v. C. & N. W. R. Co.* 89 Wis. 645, 62 N. W. 525; *Renne v. U. S. L. Co.* 107 Wis. 305, 320, 83 N. W. 473, and cases there cited; *Collins v. Janesville,* 117 Wis. 415, 427, 94 N. W. 309. The evidence on the part of the plaintiff tends to prove that just prior to the levy the plaintiff informed the defendants that the houseboat and all the articles of personal property contained therein were his property in his possession, and that they must keep off from it and let it alone; that soon after the levy upon the houseboat, and on the same day, the plaintiff went there, and found one of the defendants and another gentleman carrying his goods off from the boat and throwing them on the beach; that the plaintiff walked onto the boat and was ordered off by them, and was told to get off and stay off; that he then went away, and returned about 6 o'clock in the evening of the same day with a couple of boys to take his goods and put them under cover; that he told the gentleman there in possession of the goods that they were his property, and that the gentleman in charge then said to him: "These goods are in my possession, and you get away from here and leave them alone;" that it was cloudy and misty on that day and rained that night. It is undisputed that two or three days afterwards one of the defendants went to the plaintiff and said to him that there had been a misunderstanding about that property, and that the plaintiff could then have it, if he wanted it, and to go and get it; that the plaintiff then informed him that it had been raining on the property for two or three days and much of it had been spoiled.

3. Error is assigned because the court charged the jury upon this last phase of the evidence to the effect that if the jury were satisfied by the evidence that the property had in the meantime been materially injured by rain or otherwise, or that it had been in part carried away by persons unknown, then the plaintiff was not bound to accept such offer of return, but that in such case he was entitled to recover the fair

and reasonable value of the property in suit, as they should find the same to be from the evidence. We perceive no error in such portion of the charge. In fact the whole charge is quite favorable to the defendants, and the verdict of the jury in favor of the plaintiff is fully justified by the evidence.

4. There is no ground for the contention that the damages are excessive.

By the Court.—The judgment of the circuit court is affirmed.

THE MCCALL COMPANY, Appellant, vs. STONE, Respondent.

March 17—April 5, 1905.

Pleading: Demurrer to part of a defense.

Under sec. 2658, Stats. 1898, providing that "the plaintiff may demur to the answer or any defense therein," a demurrer cannot be addressed to a part only of a defense.

APPEAL from an order of the municipal court of the city and town of Ripon: J. J. FOOTE, Judge. *Affirmed.*

The plaintiff is a New York corporation, doing business in the state of New York, and the defendant is a merchant located in this state. The plaintiff alleges an indebtedness for dress patterns and other merchandise sold by plaintiff to defendant under a written contract between the parties dated July 9, 1901, by which the plaintiff agreed to ship to the defendant monthly, from New York, certain amounts of dress patterns and fashion magazines, and the defendant agreed to pay for the same at certain times and at certain prices. The defendant's answer contains three separate defenses, the first of which was as follows:

"For a first and separate defense defendant admits that he resides in the city of Ripon, in the state of Wisconsin, and

alleges, on information and belief, which information is derived from the original verified complaint herein, that the said plaintiff is, and at all of the times hereinafter stated was, a corporation duly organized under and pursuant to, and existing by virtue of, the laws of the state of New York, and at the times hereinafter stated was engaged in the manufacture of patterns and doing business in the state of Wisconsin and elsewhere; that the plaintiff before the 29th day of October, 1900, and on that date, entered into a contract with the defendant whereby the defendant agreed to take and did take possession, in behalf of the plaintiff, of some pigeonholes and tills, bases, counter-book covers, one outdoor metal sign, one glass sign, one sales-book, one subscription book for McCall's Magazine, all the property of the plaintiff, and did, by said agreement, commence to sell the McCall Bazar Patterns; that on the 9th day of July, 1901, the defendant, being still in the possession of the said property of the plaintiff, entered into the contract set forth in the amended complaint herein, and continued in the possession of the same, and to hold the same by virtue of the said new contract, and subject to the order of the plaintiff; that the said property is the same property mentioned in the said new contract, and was loaned to this defendant at the defendant's place of business, in Ripon, in the state of Wisconsin; that pursuant to the terms and conditions of the said contract as to the manner of keeping in stock and of conducting the sales of said patterns by the defendant at the city of Ripon aforesaid, and the reshipment of the discarded patterns to the plaintiff, and subject also to the final accounting between defendant and the plaintiff, and the adjustment of losses and profits of such sales as therein provided, the plaintiff did further engage in the transaction of business in this state affecting the personal liability of plaintiff, as above set forth, and relating to the said property of plaintiff within this state, and did, in the prosecution thereof, from time to time, after the 12th day of July, 1901, and before the commencement of this action, ship to the defendant patterns, *but the defendant denies that he has any knowledge or information sufficient to form a belief as to the quantity of said patterns, or other goods, wares, and merchandise so shipped to the defendant by the plaintiff;* that, upon informa-

tion and belief, defendant alleges that at the time of making the alleged contract said plaintiff corporation had never been organized, and has never since been organized, under the laws of Wisconsin; that it had not been, and has not since been, created under the laws of any state for religious or charitable purposes; that said corporation was not and is not a fraternal or beneficiary corporation, nor a corporation furnishing life or casualty insurance upon the mutual or assessment plan or upon any other plan; that said corporation was not organized for any one or more of the said purposes; that said corporation has not at any time prior to nor since the making of said alleged contract, prior to the commencement of this action, caused to be filed in the office of the secretary of state of Wisconsin a duly authenticated copy, or any copy, of its charter or articles of incorporation, and has not received, and was not entitled to receive, from the secretary of state of Wisconsin, a license to transact business in this state, and was not authorized nor entitled to make any contract or to transact business in the state of Wisconsin; that said alleged contract affected the personal liability of the plaintiff and related to property in this state, as more fully above set forth; that the plaintiff transacted the said business in this state under the said alleged contract with this defendant, and was engaged then and since in transacting other business in the state of Wisconsin, as defendant is informed and believes, as set forth in this answer above, in reliance upon the allegations of the original complaint herein; that, because of the failure of the plaintiff corporation to file as aforesaid a duly authenticated copy of its articles of incorporation, in the office of the secretary of state of Wisconsin, said contract was and is wholly void, and is unenforceable in favor of the plaintiff and against the defendant."

The plaintiff served the following demurrer:

"The above-named plaintiff, by Williams, Griswold & Chadbourne, its attorneys, demurs to that portion of the amended answer of the defendant in said action as is contained between the seventh line in the second folio of said amended answer, said line commencing, 'That the plaintiff before the 29th day of October, 1900,' etc., and the fifth line

of the ninth folio of said answer, said portion ending as follows, 'and is unenforceable in favor of the plaintiff and against the defendant,' except that portion of said amended answer commencing on the sixth line of the fifth folio, and reading as follows, to wit, 'but the defendant denies that he has any knowledge or information sufficient to form a belief as to the quantity of said patterns or other goods, wares, and merchandise so shipped to the defendant by the plaintiff,' for the reason that said portion of said amended answer upon the face thereof does not state facts sufficient to constitute a defense."

Those parts of the answer which are omitted by the terms of the demurrer are printed in italics. The court overruled the demurrer, and plaintiff appeals.

For the appellant there was a brief by *Williams, Griswold & Chadbourne,* and oral argument by *F. W. Chadbourne.*

For the respondent the cause was submitted on the brief of *Carter & Pedrick.*

WINSLOW, J. By the separate defense at which the plaintiff's demurrer was directed, the defendant endeavored to plead facts which would make the contract sued upon invalid under the provisions of sec. 1770*b*, Stats. 1898. Had the plaintiff demurred to that defense, the question whether that section applied to the contract set forth by the complaint, or whether that contract was unaffected by the section because it relates to commerce between the states, would have been fairly before us. The plaintiff, however, demurred to a part only of the defense. It eliminated certain paragraphs of the alleged defense and demurred to the balance. If this method of pleading be allowable, the pleader who could not frame a successful demurrer to almost any pleading would be a very dull man. All that would be necessary would be to pick out the paragraphs which by themselves state no cause of action or defense, and demur to them. However, such is not the law. The statute (sec. 2658, Stats. 1898) says, "The plaint-

iff may . . . demur to *the answer* or *any defense* therein when," etc. This court has held that a demurrer cannot be addressed to a fragmentary part of a pleading, even in a *mandamus* action, where the statute allows the relator to "demur or answer all or any of the material facts contained in the same return." *State ex rel. Rice v. Chittenden,* 107 Wis. 354, 83 N. W. 635.

These considerations make it improper for us to consider whether the alleged defense constitutes in fact a defense, for the reason that, as a whole, it has never been challenged.

By the Court.—Order affirmed.

BIRDSALL, Respondent, vs. KEWAUNEE COUNTY, Appellant.

March 17—April 5, 1905.

County board: Allowance of fees of officers in justices' courts: Statute, mandatory or directory? Repugnant provisions: Appeal: Jurisdiction.

1. Strict compliance with sec. 680, Stats. 1898, is a condition precedent to jurisdiction of the county board to allow the claim of a constable for services performed in a justice's court in an action wherein the state is a party and the county is liable for such services. The provision that "such fees shall be . . . allowed by the county board in the manner following, *and in no other way,*" cannot be held to be merely directory.
2. Sec. 680, R. S. 1878, having been amended by ch. 117, Laws of 1880 (adding "officers" to those whose claims were required to be audited in the manner therein prescribed), in so far as the amended section (now sec. 680, Stats. 1898) is repugnant to sec. 677, R. S. 1878 and Stats. 1898, the latter section must be regarded as modified accordingly.
3. Where a county board had no jurisdiction to allow a claim, an appeal from its disallowance thereof confers no jurisdiction upon the circuit court except to dismiss the proceeding.

APPEAL from a judgment of the circuit court for Kewaunee county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

November 3, 1903, plaintiff filed with the county clerk of Kewaunee county, to be acted upon by its county board, a claim for services as constable in a criminal action before a justice of the peace for such county. He intended to comply with sec. 677, Stats. 1898. The annual meeting of the board for 1903 was concluded without its taking final action on the claim. The situation was such that if the claim was filed in such a way as to give the county board jurisdiction of the matter its failure to act thereon was equivalent to a disallowance thereof. Thereupon the claimant appealed to the circuit court, setting forth in his notice, in addition to the facts before stated, that the justice of the peace before whom the action was instituted and prosecuted in which the services in question were rendered filed a certified statement of all actions or proceedings had, or tried, before him, in which the state was a party, and wherein the county of *Kewaunee* had become liable for the fees of officers, jurors, witnesses, or interpreters on the part of the state who actually attended and gave in a statement of their attendance and travel, including the action in question. The appeal was in form perfected.

Upon the matter coming on to be heard in circuit court the defendant moved to dismiss because the return failed to disclose compliance with sec. 680, Stats. 1898, so as to give the county board jurisdiction to act in the matter. Before deciding the motion the court permitted evidence to be offered showing that a certificate of the justice of the peace covering the matter in question in the form prescribed by such section was filed with the county clerk seven days before the annual meeting of the county board; that the same was approved by the district attorney, except as to the matter of plaintiff's fees and those of one Grace Havens, attention being called to the fact that separate bills were on file as to such matters. The motion was denied. A part of plaintiff's claim was disallowed because not properly itemized and the

balance, $2.47, was allowed and judgment ordered therefor, with costs. Judgment was rendered accordingly.

The cause was submitted for the appellant on briefs by *O. H. Bruemmer,* and for the respondent on the brief of *J. H. McGowan.*

MARSHALL, J. If strict compliance with sec. 680, Stats. 1898, be a condition precedent to the jurisdiction of the county board to allow the claim of a constable for services performed in justice's court in an action wherein the state is a party and the county is liable for such services, then jurisdiction was not obtained by the county board as to the matter in hand. In that case the appeal to the circuit court failed to confer jurisdiction on it to do more than to dismiss the proceedings, and the judgment appealed from must be reversed. *Klaise v. State,* 27 Wis. 462; *Stringham v. Winnebago Co.* 24 Wis. 594; *Felt v. Felt,* 19 Wis. 193; *Stoltman v. Lake, ante,* p. 462, 102 N. W. 920.

It is conceded by respondent's counsel, as the fact is, that compliance with sec. 677, as regards the matter of presenting claims to county boards for consideration, is requisite to confer jurisdiction on such boards over the subject matter of such claims, but it is insisted in respect to the matter in hand that there was such compliance and that the claim is governed by such section, the provisions of sec. 680, in respect thereto, if applicable at all, being only as regards evidence to establish a claim presented under sec. 677, and directory only. No reason is perceived why the reasoning of the court in *Outagamie Co. v. Greenville,* 77 Wis. 165, 45 N. W. 1090; *Miller v. Crawford Co.* 106 Wis. 210, 82 N. W. 175; and *Northern Trust Co. v. Snyder,* 113 Wis. 516, 89 N. W. 460, resulting in a conclusion that reasonably strict compliance with sec. 677, as to claims referred to therein, is requisite to confer jurisdiction on county boards to consider the same, does not apply with equal, if not greater, force to sec.

680, as to liabilities referred to therein. Probably there is no class of claims which calls for more caution in auditing the same to guard against useless and extravagant expenditures of public money than those growing out of administration of the criminal law by justices of the peace. It seems probable that the legislature so viewed the matter in providing specially in respect thereto, and prohibiting the allowance of such claims not presented and established as therein provided.

The history of the two sections of the statutes referred to leaves little or no ground for holding that sec. 680 does not apply to constables' fees as well as to fees of witnesses, jurors, and other persons named therein. Sec. 677 is based mainly on ch. 160, Laws of 1868. What are now the opening lines of the section at first read this way:

"Any officer or other person having a demand or claim against any county for money or other thing, shall make out a statement thereof in writing, with his affidavit attached," etc.

There was in the beginning no exception in favor of any class of claimants. As a companion piece of legislation to ch. 160, the two being approved at the same time, ch. 153, Laws of 1868, was passed, and that forms the basis of what is now sec. 680. It at first referred to fees of jurors, witnesses, and interpreters, made the justice's certificate conclusive evidence of the claims of the persons named therein, required the board to audit the claims and draw orders for their payment, and provided that "no claim of any juror, witness or interpreter for fees which may become due after this act goes into effect, shall be allowed by any board of supervisors, unless it comes before them in the manner above prescribed." The two acts were so plainly repugnant to each other as to attract the attention of the revisers who compiled the Statutes of 1878. They remedied the difficulty by providing in sec. 677, as framed to embody ch. 160, Laws of

1868, that jurors, witnesses, and interpreters should be exempt therefrom. The auditing of claims as to such persons was regulated by sec. 680, which the revisers framed to embody the ideas contained in ch. 153, aforesaid. The language of sec. 4 of said ch. 153, to wit: "No claim of any juror, witness or interpreter for fees which may become due after this act goes into effect, shall be allowed by any board of supervisors, unless it comes before them in the manner above prescribed," was condensed into the few words, "shall be . . . allowed by the county board in the manner following, and in no other way." By ch. 117, Laws of 1880, sec. 680 was amended by adding to those whose claims were required to be audited in the manner therein indicated, "officers." To make it clear that the claims of constables and sheriffs were the officers referred to, the form for the justice's certificate was amended so as to specially mention them. With some other changes, not necessary to be noted, the section came to be in the form found in the Statutes of 1898. The amendment of sec. 680 by the law of 1880 to that extent made it plainly repugnant to sec. 677. Such being the case the latter section must be regarded as modified accordingly. *Woodman v. Clapp,* 21 Wis. 355; *State v. Stillman,* 81 Wis. 124, 51 N. W. 260. It is a familiar rule that an act relating to a subject matter already covered by the written law, without any repealing clause or any express intention to change such law, does not work any change therein, so far as the two enactments can reasonably stand together, but that otherwise a change in harmony with the latter act is thereby effected, because it is assumed that the legislature must have so intended. The case might be grounded alone on subd. 15, sec. 4972, Stats. 1898, which provides that in case of otherwise unavoidable repugnance between two sections of the same chapter the "last in numerical order shall prevail unless such construction be inconsistent with the meaning of such chapter" in which they are found.

It seems plain that effect cannot be given to sec. 677 and at the same time to sec. 680 as to officers' fees such as those in question. The former provides how claims against the county must be presented to county boards in order to enable such boards to audit the same, those of certain persons, not including officers, entitled to compensation for attending trials in justices' courts being excepted, and in effect prohibits allowance of any such claim not so presented. Sec. 680 provides that claims of the character there specified shall be certified in a prescribed form, by the justice in whose court the same originate, to the county clerk of his county ten days before the annual meeting of the county board of such county; that such clerk shall deliver the certified statement to the district attorney of the county for his opinion thereon; that he shall report as to each item mentioned as to whether the county is or is not liable therefor and if liable for a part only, what part; that the statement and report shall then be laid before the county board for its action thereon; that such certified statement shall then stand as presumptive evidence of the claims referred to therein; that the board shall examine and allow such as are legal and direct that orders be drawn for the amount to each person; and that such claims shall be allowed in that manner "and in no other way." It would be difficult to use words more fully excluding every way of doing a particular thing than one prescribed, than to say that it shall be done in that manner and "in no other way." We cannot perceive any avenue of escape from the conclusion that the amendment to sec. 680, made in 1880, added officers to those whose fees are required to be audited thereunder and to that extent sec. 677 was amended thereby.

Effect must be given to the statute as we find it. The legislature *ex industria* placed words therein to guard against the possibility, apparently, of its being held that any stated condition precedent to the allowance of a claim is directory. That is evidently what the words "in no other way" were used

for. The certificate of the justice here was not filed with the county clerk ten days before the annual meeting of the county board. True, it was filed at a later time and was referred, as the law requires, to the district attorney for his consideration, but he did not report as to the liability of the county regarding the claim of the appellant. So in two material particulars the claim was not in shape to be audited at the annual meeting of the county board for 1903. It never acquired jurisdiction of the matter and therefore the condition requisite to the acquirement of jurisdiction by the circuit court to review its action, or nonaction, is wanting.

We have not overlooked the fact that when the legislature amended sec. 680 it failed to make a corresponding amendment to sec. 681, affording officers as well as others named in the former a right of action against a justice of the peace in case of his failing to perform his duty thereunder. That may have been an oversight, or it may have been thought that jurors, witnesses, and interpreters, whose claims are often so small that very little effort could be afforded by claimants for the collection thereof, should have the sums allowed without personal attention thereto. Whatever may be the reason, the court cannot change the situation as the legislature has seen fit to leave it.

By the Court.—The judgment is reversed, and the cause remanded with directions to dismiss the proceedings.

STEHN, Administrator, Respondent, vs. HAYSSEN and others, Appellants.

March 18—April 5, 1905.

Circuit and county courts: Jurisdiction: Estates of decedents: Partnership: Accounting: Wills: Construction: Title to personalty: Laches: Limitation of actions: When cause of action accrues: Failure to present claim against decedent: Pleading: Demurrer: Presumptions.

1. The circuit court has jurisdiction of an action by the personal representative of one deceased partner for an accounting and settlement of the partnership affairs, although the estate of a subsequently deceased partner is in process of settlement in the county court, where there is a surviving partner who is a necessary party and against whom judgment cannot be recovered in the county court.
2. In an action by the personal representative of a deceased partner for a partnership accounting and settlement, there being no suggestion in the complaint that the persons interested in the estate of the deceased, some of whom were minors without guardians, had settled the partnership matter, no such settlement will be presumed, on demurrer, to have taken place.
3. A will giving to the testator's widow during widowhood, and until his youngest child should arrive at the age of maturity, "all my property of whatever description . . . including my interest in the firm," etc., did not give the widow such partnership interest as a specific bequest, to be enjoyed by her *in specie*, but merely mentioned such interest for greater certainty and disposed of it in the same way as the other property.
4. Neither the widow nor the other legatees (the testator's children) could take title to such partnership interest except through the medium of an executor or administrator; and upon appointment of an administrator the right to recover such interest vested in him.
5. From the complaint in the action for an accounting it appeared that the widow and children were ignorant of their rights under the will and of their right to an accounting; that the widow did not qualify as executrix; that no administrator was appointed until about sixteen years after the will was proved, when one of the testator's sons, within a few months after attaining majority, was appointed administrator with the will annexed and commenced the action. *Held*, on demurrer, that the complaint did not show laches.

6. There being no person in existence who could bring the action for an accounting until the appointment of plaintiff as administrator, the cause of action did not accrue until such appointment, and the action was not barred, under sec. 4221, Stats. 1898, at the expiration of ten years after the dissolution of the partnership by the death of plaintiff's testator.
7. Defendant, not having pleaded a limitation under sec. 4251, Stats. 1898, could not rely thereon, even if the time limited thereby had expired.
8. Failure to present a claim on behalf of the testator's estate against the estate of the subsequently deceased partner did not operate as a bar, under sec. 3844, Stats. 1898, to the action for an accounting, or prevent the reaching of partnership property therein, whatever its effect might be as to a money recovery against the last-mentioned estate.
9. That the testator's widow may, contrary to legal right, have participated in continuing the business of the partnership—no such fact being stated in the complaint—is not ground for a demurrer for defect of parties upon the theory that the widow is a necessary party.

APPEAL from an order of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

The appeal is from an order overruling separate demurrers to the complaint. That document alleged that for many years prior to 1886 one John H. Stehn was associated as copartner with John M. Kohler and *Herman Hayssen* in the manufacturing business at Sheboygan; that Stehn died in November, 1886, leaving a widow and six children, of ages from twelve to two years, and leaving a will, by which he gave "unto my beloved wife, to have and to hold unto her own use, and as long as she may remain my widow and until the youngest of my children shall have arrived at the age of maturity, all of my property of whatsoever description, real, personal, or mixed, including my interest in the firm of Kohler, Hayssen & Stehn, of the city of Sheboygan. In case my wife shall remarry, and whenever the youngest of my children shall arrive at the age of maturity, all of my property aforesaid shall be divided equally between

my said wife and children then living, share and share alike." This will was proved in January, 1887, but the widow, who was named as executrix, never qualified, nor was any other executor or administrator appointed until May 4, 1903, when the present plaintiff, having then just attained his majority, applied for and received appointment as administrator with the will annexed. At that time five of the children had attained their majority, and one was still a minor; all of them, together with their mother, the widow, being still alive, and the latter not being married. On November 5, 1900, one of the partners, John M. Kohler, died testate, and the defendants, *George Heller* and *Robert J.* and *Walter J. Kohler,* were appointed as executors, and due notice given for the proof of claims against that estate, the time of which expired before plaintiff's appointment as administrator.

The complaint further alleges that all the property and records of the partnership business have continued in the hands of the defendants up to the present time; that at the time of Stehn's death his interest in the partnership was of the value of $12,000, which, by reason of profits and accumulations, had increased to $28,000 at the time of Kohler's death; that all debts and liabilities of the partnership had been paid and satisfied, and a large surplus of real estate and personal property, both of original capital and increase, remains in the possession of the defendants; that at the time of Stehn's death an extensive business was being done, and the partnership had many debts, credits, and contracts outstanding which were not consummated and realized upon for "a number of years after his death;" that *Hayssen* and Kohler both drew out from time to time large sums of money; that the amounts thereof, and the status of the affairs of the firm, are unknown to the plaintiff, but all within the knowledge and control of the defendants; that plaintiff, until about the time of his appointment as administrator, was not aware

of the contents of his father's will, and that he and all the other legatees therein were ignorant of their rights under said will, and of their right to an account by the surviving partners, and that no guardian was ever appointed for any of Stehn's children; that he has demanded an accounting from the defendants of the partnership affairs, and payment of such sum as might be found due him as such administrator, but has been refused; that there is a large sum due him, but that, without accounting and discovery, he is unable to state the amount, but believes the same to be $28,000; that said accounting and discovery are necessary; wherefore he prays an accounting and discovery of the property and assets, appointment of receiver to take charge of books, papers, and assets, and that the defendants be adjudged to pay, in such proportions as may be found due, such sum as may equal the proportion of the value of the assets belonging to Stehn at his death, after payment of the debts of the partnership, together with the accrued profits derived from the use thereof; also that he have general relief.

The surviving partner, *Hayssen,* demurred on grounds: (1) No cause of action stated; (2) that the action was barred by sec. 4221, Stats. 1898, (3) by sec. 4222, Stats. 1898, (4) by sec. 4226, Stats. 1898, (5) by sec. 4227, Stats. 1898; and (6) for defect of parties defendant. The executors of Kohler's estate demurred: (1) For want of jurisdiction of the subject matter; (2) failure to state a cause of action; (3) bar by sec. 4221, Stats. 1898, (4) by sec. 4222, Stats. 1898, (5) by sec. 4227, Stats. 1898, and (6) by sec. 3844, Stats. 1898.

For the appellant *Hayssen* there was a brief by *Andrew Gilbertson,* and for the appellant executors a separate brief by *Francis Williams,* and the cause was argued orally by *Mr. Gilbertson.*

For the respondent there was a brief by *Bowler & Bowler*

and *Edward Voigt,* and oral argument by *E. R. Bowler* and *Mr. Voigt.*

DODGE, J. 1. This action is clearly within the proper jurisdiction of the circuit court, for the reason that the county court, in the settlement of the Kohler estate, cannot bring before it, or render judgment against, the surviving partner, *Herman Hayssen,* whose presence is essential to the ascertainment and full adjudication of the rights of all parties. *Gianella v. Bigelow,* 96 Wis. 185, 71 N. W. 111; *Morey v. Fish Bros. W. Co.* 108 Wis. 520, 84 N. W. 862; *Gager v. Paul,* 111 Wis. 638, 87 N. W. 875.

2. The basis of the contention that the complaint does not state facts sufficient to constitute a cause of action is not made very apparent by the briefs, although considerable space is devoted thereto. It seems to rest on the proposition that the parties interested in the estate of John H. Stehn might have so settled the partnership matter, and indeed his whole estate, that an administration would be unnecessary. It is not pretended that there is any suggestion in the complaint that they have done so, and in view of the fact that some of them have at all times been minors, without guardians, the probability of any effective settlement would hardly seem so imminent as to warrant the presumption that it must have taken place.

Another suggestion under this head is that the will is to be construed as giving the deceased's interest in this partnership as a specific bequest to his widow, to be enjoyed by her *in specie.* We do not think the will is open to such construction. It is to us apparent that the phrase, "all of my property of whatsoever description, real, personal, or mixed, including my interest in the firm of Kohler, Hayssen & Stehn, of the city of Sheboygan," did not dispose of that interest differently from any of the other property; that it was

specially mentioned merely for greater certainty, by reason of a possible doubt in the testator's mind whether such an interest was fully described by the expression "property." Apart from these considerations, however, neither the widow nor any of the other legatees could take any title to any of the personal property except through the medium of an executor or administrator, so that, an administrator having been appointed, all rights in any of the personal property left by the deceased, including the right to recover his interest in that copartnership, are now vested in that administrator, and must be sued for by him. *Blakely v. Smock,* 96 Wis. 611, 71 N. W. 1052; *Buttles v. De Baun,* 116 Wis. 323, 93 N. W. 5; *McKenney v. Minahan,* 119 Wis. 651, 97 N. W. 489; *Rowell v. Rowell,* 122 Wis. 1, 99 N. W. 473.

It seems also to be suggested that the complaint fails to state a cause of action because of laches in the plaintiff. But in view of the fact that this plaintiff commenced the suit within a few months after attaining his majority, and that it is expressly alleged in the complaint that none of the beneficiaries in the estate had any knowledge of the existence of their rights thereunder, we cannot seriously consider the suggestion that laches appears on the face of the complaint.

3. *Limitations.* Under this head four different sections of ch. 177, Stats. 1898, are pleaded. For what purpose, is not very apparent. The only statute which in any wise describes the action is subd. 4, sec. 4221, Stats. 1898:

"An action which, on and before the twenty-eighth day of February in the year one thousand eight hundred and fifty-seven, was cognizable by the court of chancery, when no other limitation is prescribed in this chapter."

An action for partnership accounting and settlement was one which, prior to 1857, was cognizable by the court of chancery. Such action, by that section, is barred within ten years after the cause of action accrues. No cause of action can accrue until there is some person in existence who can

bring it, and there is no person in existence to bring an action in favor of the estate of a deceased person, which arises after death, until an executor or administrator is appointed. *Bucklin v. Ford,* 5 Barb. 393; *Dunning v. Ocean Nat. Bank,* 61 N. Y. 497; *Sanford v. Sanford,* 62 N. Y. 553; *Sambs v. Stein,* 53 Wis. 569, 572, 11 N. W. 53. Our limitation statutes were framed in 1878, and sec. 4251, R. S. 1878, was added in express recognition of that rule. Revisers' Notes, 1878. Hence this cause of action did not accrue until the appointment of plaintiff as administrator in 1903. Another section (sec. 4251, Stats. 1898) does provide that, "There being no person in existence who is authorized to bring an action thereon at the time a cause of action accrues shall not extend the time within which, according to the provisions of this chapter, an action can be commenced upon such cause of action to more than double the period otherwise prescribed by law;" but defendants have not pleaded this limitation in their demurrer, as they would need to, in order to meet the requirements of sec. 2651, Stats. 1898. But, in any event, the time limited by sec. 4251, Stats. 1898, from the time of the dissolution of this partnership by the death of Stehn, in 1886, has not yet expired, that time being twenty years.

The separate demurrer of Kohler's executors also raises sec. 3844, Stats. 1898, as a bar by limitation, but it cannot have any effect to prevent the partnership accounting, nor the reaching of property belonging to the partnership, whatever its effect on any money recovery against the Kohler estate.

4. The separate demurrer of *Hayssen* also asserts, as a ground, "defect of parties." Such demurrer, of course, cannot stand in face of the provisions of sec. 2651, Stats. 1898, which requires that a demurrer on that ground shall set forth a particular statement of the defect. However, as we are informed by the brief, the defect complained of is the

absence of Mrs. Stehn as a party, and the claim that she is a necessary party apparently because she has the legal title to her deceased husband's interest in this partnership as a specific bequest, and because she may have continued that interest and participated in running the business since his death. That she has not the legal title, for two reasons, has already been shown. That she may, contrary to legal right, have participated in running the business, is certainly no ground of demurrer when the complaint states no such fact. If, by reason of any acts of hers not disclosed by the complaint, she may be a necessary party, those facts must be brought to the notice of the court by some pleading able to assert them.

By the Court.—Order affirmed.

REDDINGTON, Respondent, vs. FRANEY, Appellant.

March 18—April 5, 1905.

Partnership: Lien of creditors: Sale of partner's interest: Agreement to pay debts: Rights and liabilities of incoming partner.

1. Creditors of a partnership have no claim or lien upon the firm property other than creditors generally have on a debtor's property; and the partnership has the same right to dispose of its assets that individuals have.
2. The equity between partners to have the firm assets applied to payment of its debts may be preserved by an outgoing partner for his protection, and when so preserved will inure to the benefit of the creditors, who may claim through such partner's equity.
3. Where a retiring partner sold to an incoming one his interest in the firm assets and agreed to pay all the outstanding liabilities, neither he nor the creditors had any lien upon the firm assets or equity to compel application thereof to such liabilities; and, there being no obligation on the part of the incoming partner to pay the debts of the old firm, the fact that he does pay them gives him no right of action to recover the amount so paid from the retiring partner.

APPEAL from an order of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

This is an appeal from an order overruling a demurrer to the complaint. The material allegations of the complaint are as follows: *John Franey,* the defendant, was associated with Thomas F. Franey under the firm name of T. F. Franey & Co., which was engaged in a retail furniture business and the sale of musical instruments and undertakers' supplies. On June 30, 1902, defendant, in consideration of $4,700, sold to plaintiff his undivided one-half interest in the partnership, being all his right, title, and interest in the stock and in the bills receivable and accounts owing to the firm. Defendant agreed to pay all outstanding bills payable or accounts payable by the firm of T. F. Franey & Co., and to hold the plaintiff whole, safe, and free from these accounts. It was agreed that plaintiff was to have the same rights over the management of the business and affairs of the firm as the defendant had had. It is alleged that defendant represented that there were no bills payable, and that plaintiff relied upon this representation, while in fact the firm was indebted in the sum of $3,815.92. It is also alleged that:

"By reason of the defendant's failure, neglect, and refusal to pay and discharge the outstanding bills payable by said firm of T. F. Franey & Co., as provided by the terms, conditions, promises, and covenants of said bill of sale, the plaintiff was required to pay and did pay the then outstanding bills payable or accounts payable of said firm of T. F. Franey & Co., the sum of $3,815.92."

Plaintiff asked for judgment for this amount and interest. Defendant interposed a general demurrer to the complaint. This was overruled, and he was allowed thirty days in which to answer. As stated above, this is an appeal from such order.

The cause was submitted for the appellant on the brief of *M. C. Mead,* and for the respondent on that of *Simon Gillen.*

SIEBECKER, J. It is contended by plaintiff that the complaint states a good cause of action because it is alleged that under the contract he was to succeed defendant in the firm of T. F. Franey & Co., whose business was to be conducted as before, and because defendant undertook to pay all the liabilities of the firm existing at the time of such sale and transfer of his interest to plaintiff, and "by such payment to hold the plaintiff, vendee, whole, safe, and free from the same or any part thereof." This claim assumes that the creditors of the old firm had a lien on the firm property which they could enforce against the property after the plaintiff had purchased and gone into possession of defendant's interest in the firm assets.

It is fundamental in partnership transactions that creditors have no other claim or lien than creditors generally have on a debtor's property. A partnership has the same right of disposition of the partnership assets that individuals enjoy in the law. 2 Bates, Partn. § 820. There is an equity between partners giving them the right to compel application of firm assets to the payment of its debts. This right may be preserved by an outgoing partner for his protection in extinguishment of partnership liabilities, and when so preserved it will inure to the benefit of creditors, who may claim through such partner's equity. *Thayer v. Humphrey,* 91 Wis. 276, 64 N. W. 1007. The allegations of the complaint, however, do not present such a case. It is alleged that it was expressly agreed between plaintiff and defendant that the defendant, upon retiring from the partnership between himself and T. F. Franey, was to pay all outstanding bills and accounts. This sale operated as a dissolution of the partnership, and the outgoing partner expressly relinquished all his equities to have the firm assets applied in payment of the firm's debts. Since partnership creditors have no claim or lien on the firm's assets, and it appearing that the defendant, as outgoing partner, wholly

disposed of his interest in the firm assets, and expressly relinquished his right to have them applied in payment of the existing liabilities, no right remained in him to which creditors could be subrogated, and hence there was no liability on the part of plaintiff to pay the partnership debts. *Case v. Beauregard,* 99 U. S. 119; *Thayer v. Humphrey, supra.*

The allegations of the complaint are that defendant made a valid disposition of his interest in the firm to plaintiff, agreeing to pay the liabilities of the firm. Nothing is alleged to show that plaintiff became obligated to pay the partnership liabilities through defendant's neglect and refusal to pay them. Plaintiff was in no way liable to pay the amounts owing by the old firm, either under his contract of purchase or by implication of law as incoming partner to continue the business in the name of the old firm and the taking over of its assets. The legal result of this transaction was that plaintiff and T. F. Franey became a new partnership under the old firm name, which held and owned the assets free from all claim or lien as to the creditors of the old firm and defendant as retiring partner. *Case v. Beauregard, supra; Thayer v. Humphrey, supra; Harris v. Lindsay,* 4 Wash. C. C. 98; *Nickerson v. Russell,* 172 Mass. 584, 53 N. E. 141; 22 Am. & Eng. Ency. of Law (2d ed.) 206; *Allen v. Logan,* 96 Mo. 591, 10 S. W. 149; *McCall v. Moss,* 112 Ill. 493. The demurrer to the complaint should have been sustained.

By the Court.—The order overruling the demurrer is reversed, and the cause remanded with directions to enter an order sustaining the demurrer, and for further proceedings according to law.

SCHULTZ, Respondent, vs. EBERLE, Appellant.

March 18—April 5, 1905.

Real-estate brokers: Right to commission: Court and jury.

In an action to recover for services in negotiating an exchange of lands, the evidence being conflicting as to the terms of the oral contract under which plaintiff claimed, it is *held* that it was a question for the jury whether he had earned the agreed commission.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

This action was commenced in a justice's court of Washington county by the plaintiff to recover for services alleged to have been performed by plaintiff for defendant. The complaint was oral, and alleged that defendant was indebted to the plaintiff in the agreed sum of $100 for services performed by plaintiff for said defendant, at his special instance and request, in and about finding said defendant a purchaser for his farm, situate in the town of Jackson, Sheboygan county, Wisconsin. The answer is a general denial. Judgment was rendered in justice's court for the plaintiff.

Defendant appealed to the circuit court for Washington county, and a change of venue was taken to the circuit court for Sheboygan county and the case tried. After the evidence was in, both parties moved for a directed verdict; and the court, on plaintiff's motion, directed a verdict for the plaintiff for the amount claimed. Judgment was rendered in favor of the plaintiff upon the verdict, from which this appeal is taken. Defendant assigns the following errors: (1) The court erred in directing a verdict for plaintiff. (2) The court erred in refusing to direct a verdict for defendant.

The cause was submitted for the appellant on the brief of

Bow & Ferguson, and for the respondent on that of *Barney & Kuechenmeister.*

KERWIN, J. The only question involved upon this appeal is whether there was evidence sufficient to go to the jury on the material facts in the case, namely, the terms of the contract between the plaintiff and defendant, and whether it had been performed upon the part of the plaintiff.

The contract was oral, and its terms must be gathered from the testimony produced on the trial. It is contended by plaintiff that under the contract it was incumbent upon plaintiff, in order to earn the $100, to produce a party ready, willing, and able to exchange Milwaukee property for defendant's farm upon terms satisfactory to defendant, and that upon so doing he had performed his contract and became entitled to recover his commission. The testimony of the plaintiff himself would seem to bear the construction that he was not only to produce a person ready, willing, and able, but one with whom the defendant would agree. Upon the trial plaintiff testified:

"*Q.* Now go on and tell the rest of it. *A.* He told me I should come out with the man that owned that property, on his farm; and, when he told me that, he says, 'If I would agree with the man on that property, how much commission I would charge?' I told him $100. He says, 'All right.' "

This is the main evidence of contract on the part of plaintiff. Pursuant to this talk, plaintiff and Rohr, owner of the Milwaukee property, called upon defendant at his farm February 13, 1903, and, according to plaintiff's version of the testimony, agreed upon the exchange of defendant's farm for the Rohr property in Milwaukee, Rohr paying defendant $25; but no papers were passed or the deal concluded. At this time each party gave plaintiff his abstract to have extended, and it was then agreed that on the following Wednesday, February 18, 1903, they would meet at

Cedarburg. They met accordingly, but nothing was done, they agreeing to meet again on the 23d, defendant refusing to execute a deed because his wife had not seen the Milwaukee property. Plaintiff further testified that on the 23d he and Rohr did not go to Cedarburg because they were not ready. Some two weeks later they went to defendant's farm and defendant then refused to trade.

There is evidence on the part of the defendant tending to show that the agreement was that plaintiff was not to have his commission unless a trade was actually made, and after the papers were executed, and "when the papers and everything would be all O. K." Furthermore, defendant did not agree to close the bargain at the time testified to by plaintiff, but reserved the right to examine into the value of the Milwaukee property and also to examine it with his wife, and that he would not trade until he found out all about what plaintiff was telling him. That he took the $25 with the understanding that if no trade was made he would return it, and that he refused to give a receipt, so he would not be bound, and with the understanding that he and his wife should have an opportunity to examine the property. On the 23d of February, 1903, defendant went to Cedarburg as agreed, but neither plaintiff nor Rohr appeared; and on the 27th he went to Milwaukee and looked over the property, and then went to the home of plaintiff and informed plaintiff he would not trade; tendering him the $25, which plaintiff refused to accept, telling defendant to give it to Rohr.

It is contended by counsel for plaintiff that the uncontradicted testimony shows that plaintiff fulfilled his contract by securing a party with whom defendant agreed to trade, thereby earning his commission. From a careful examination of the testimony we are convinced that the case should have been submitted to the jury. The defendant's testimony very strongly tends to prove that the commission was

not to be paid until the exchange of property was consummated on terms satisfactory to defendant; that plaintiff was to have $100 commission when the deal was made and the papers and everything done satisfactory to defendant. There is sharp conflict in the evidence upon the main issues, and the case should have been submitted to the jury. It follows, therefore, that the court erred in directing a verdict for plaintiff, and that no error was committed in refusing to direct a verdict for defendant.

By the Court.—The judgment of the court below is reversed, and the cause remanded for a new trial.

JOHNSON, Respondent, vs. TOWN OF HIGHLAND, Appellant.

March 18—April 5, 1905.

Highways: Insufficiency: Injury to traction engine: Duty of town: Court and jury: Contributory negligence: Opinion evidence.

1. It is the duty of a town to construct and maintain its highways so that they will be reasonably safe for public travel by traction engines such as are in use in that part of the country.
2. In an action against a town for injuries to a traction engine, alleged to have been caused by defects in a highway, the question as to the insufficiency of the highway, and the question of contributory negligence on the part of plaintiff or his employee who was steering the engine, are *held* to have been for the jury.
3. In an action against a town for injuries to a traction engine which ran off the roadway and down a bank, the question whether plaintiff's employee was negligent in steering the engine being one of the ultimate questions for the jury to determine, it was error to permit plaintiff to testify that in his opinion the employee had the necessary knowledge and ability to safely steer a traction engine.

APPEAL from a judgment of the circuit court for Iowa county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

This action was commenced before a justice of the peace to recover damages for injuries to the plaintiff's traction engine caused by the alleged insufficiency and want of repair of the public highway in question. Issue being joined and trial had, judgment was rendered in favor of the defendant before the justice. The plaintiff appealed to the circuit court, where the cause was retried *de novo;* and at the close of the trial a verdict was returned in favor of the plaintiff and his damages assessed at $100. From the judgment entered thereon for the amount stated and costs, the defendant appeals.

The giving of the requisite notices is admitted, and the amount of damages sustained is conceded to be as found by the jury. There is evidence tending to prove that at the time of the accident the traction engine was being driven in a southwesterly direction; that the road was dug out of the hillside, and the dirt was thrown down over the lower side; that there was quite a steep hill rising on the left or easterly side of the road; that lengthwise the highway was nearly level and about eight feet wide at the place of the accident, and for about two or three rods and further back it was wider; that at the foot of the little hill it was wide enough for teams to pass; that the hind wheels of the traction engine were seven feet one and a half inches in width and four feet seven and a half inches in diameter; that the diameter of the front wheels was three feet three inches, and the track made by them was four feet three inches; that from the center of the hind wheels to the center of the front wheels, when the engine was straight, was seven feet, and then the front wheels were nine and a half inches from the rub iron on the boiler; that in turning around it takes twelve turns of the steering wheel to cramp the front wheel to a point half an inch from the rub iron. At the time of the accident the plaintiff was riding on the left or uphill side

of the engine, and his employee, Buttress, was riding on the right or downhill side of the engine, and steering the same.

Among other things, the plaintiff testified to the effect that they came along to the place of the accident at a slow gait, like a team would walk—he watching the upper side and Buttress the lower side; that just as they got down the hill, onto the level, and were turning the curve there was a kind of steep bank below, and Buttress was crowding the bank on the left-hand side, when the plaintiff noticed a rock sticking out of the bank, and so he told Buttress to "turn down," and he did turn down, and the front wheel got over the bank; that the road was not wide enough, and so the engine got down over the bank, which gave way, and Buttress could not get it back; that he did not know the size of the rock; that it was imbedded in the bank, with a sharp corner sticking out; that they did not run over the rock, but were up on the bank as far as they dared to go; that the engine rolled over once and a half below.

Among other things, Buttress testified to the effect that he had run the engine for three years before the accident, and understood steering it; that it was steered with a crank or roller; that turning the crank turned the front wheels, by means of two chains on each side; that the plaintiff told him to turn it down and he did turn it down, and the front wheels went over the bank; that at that time the left hind wheel was running up against the bank on one side, to keep from going over on the other side; that he saw the rock afterwards; that he did not know how far the engine was from the rock when it went off the bank, but it was not many feet; that he tried to get the front wheels back onto the bank, but he could not do so, and when the hind wheel struck the bank it gave way and the engine tipped over.

L. H. Bancroft, for the appellant.

For the respondent there was a brief by *Smelker & Smelker,* and oral argument by *J. P. Smelker.*

CASSODAY, C. J. 1. The propelling of steam engines upon the public highways of the respective towns in this state has for twenty years been regulated by the statutes. Ch. 175, Laws of 1885; ch. 509, Laws of 1889; ch. 367, Laws of 1891; sec. 1347*b*, Stats. 1898; ch. 197, Laws of 1899; ch. 424, Laws of 1903. Such statutes impliedly justify the use of such public highways and bridges by traction engines, without liability on the part of the owners, so long as they comply with the requirements of such statutes. *Walker v. Ontario,* 111 Wis. 113, 86 N. W. 566. In that case it was held, in effect, that the proper authorities were under obligation to keep up their highways and bridges to a standard of usefulness and safety sufficient for such use. Id. It follows that there was no error in charging the jury that it was the duty of the town to construct and maintain its highways in a reasonably safe condition for public travel by traction engines such as were in use in that part of the country, as well as by wagons and other vehicles. The question as to the insufficiency of the highway at the time and place in question seems to have been properly submitted to the jury, and the verdict in that regard is sustained by the evidence. *Slivitski v. Wien,* 93 Wis. 460, 67 N. W. 730.

2. Nor can we hold, as a matter of law, upon the facts mentioned in the foregoing statement, that the plaintiff or his employee, Buttress, who was steering the engine at the time of the accident, was guilty of contributory negligence. *Gerrard v. La Crosse C. R. Co.* 113 Wis. 258, 265, 89 N. W. 125.

3. Error is assigned because the plaintiff was permitted to testify and give his opinion as to whether Buttress had the necessary knowledge and ability to safely steer a traction engine. It is well settled that "the opinions of witnesses, which do not relate to matters of science, art, or skill in some particular matter or department of business, are

not admissible in evidence." *Luning v. State,* 2 Pin. 215; *Oleson v. Tolford,* 37 Wis. 327; *Robinson v. Waupaca,* 77 Wis. 544, 46 N. W. 809; *Daly v. Milwaukee,* 103 Wis. 588, 590, 79 N. W. 752.

"The rule is that experts are not to decide issues of fact; hence all questions calling for opinion evidence must be so framed as not to pass upon the credibility of any other evidence in the case, else it will usurp the province of the jury or the court." Jones, Evidence, § 374, and cases cited; *Maitland v. Gilbert P. Co.* 97 Wis. 476, 484, 72 N. W. 1124; *Lounsbury v. Davis, ante,* p. 432, 102 N. W. 941.

So: "Where evidentiary facts, upon which the fact in issue depends, are in dispute, opinion evidence as to the ultimate fact must be given upon a hypothetical case." *Maitland v. Gilbert Paper Co., supra,* and *Daly v. Milwaukee, supra.*

The facts are undisputed. The engine ran off the dugway because Buttress, in obedience to the direction of the plaintiff, as mentioned, turned down the steering wheel so far that he could not prevent the engine from going over the bank. Whether such conduct of Buttress was or was not negligence was one of the ultimate facts to be determined by the jury. To allow improper opinion evidence on that question would certainly tend to mislead the jury.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

ULLMAN, Plaintiff in error, vs. THE STATE, Defendant in error.

March 18—April 5, 1905.

Criminal law and practice: Jurors: Challenge to the array, how made and determined: Waiver: Jury lists: Drawing: Harmless irregularities: Assault with intent to kill: Evidence: Opinions: Appeal: Bill of exceptions.

1. By the rules of the common law a challenge to the array is required to be made in writing stating specifically the grounds thereof.
2. The Code is a complete system for criminal as well as civil actions. While it provides no challenge to the array it does not invade the inherent power of the courts, which, by the settled practice, accords to either party to an action triable by a jury an opportunity to object to the entire panel of jurors upon any ground deemed by him to affect the validity thereof.
3. An objection of the sort before mentioned may be by a formal challenge, or by a mere objection, or by a motion to quash the return, or to dismiss the jury, mere form not being material, and it may properly be, as it commonly is, denominated a challenge to the array.
4. In whatever form the challenge to the array, so called, is made, the specific grounds relied on should be definitely stated, though not necessarily in writing, it being sufficient if it is made at the bar of the court and taken down by the reporter.
5. How specific the grounds of a challenge to the array should be made in order to entitle the moving party to a hearing is within the discretion of the court, such discretion, however, not being broad enough to permit the grounds to be stated so generally or obscurely as not to reasonably inform the adverse party of the precise nature thereof.
6. A proper objection to the entire panel of jurors should be summarily determined by the court, evidence being taken where necessary to the decision of disputed questions of fact.
7. In order to entitle a person deeming himself aggrieved by a ruling on a challenge to the array to a review thereof on an appeal, exception must be duly taken thereto, and the specific objections and proceedings thereon and such exception be embodied in a bill of exceptions.
8. The law requiring the jury commissioners to furnish the clerk of the circuit court a list of names of persons qualified to serve as jurors to be drawn from the body of the county is satisfied

if each commissioner proposes a partial list and all are adopted by the commissioners as the one list required by the statute and are delivered to the clerk of the circuit court accordingly.

9. Failure of the commissioners to authenticate the list of names furnished to the clerk as above stated, or of the clerk of the circuit court to make a list of such names and deliver the same to at least one of the commissioners, or failure of such clerk or his deputy to personally write the names upon separate slips of paper, fold and deposit the same in the box ready for drawing, such acts being performed by an employee of the clerk under his direction and in his immediate presence, are harmless irregularities, in the absence of proof by a party deeming himself aggrieved that he is actually prejudiced thereby.

10. As a rule irregularities in executing a statutory method for selecting jurors are deemed immaterial, unless it appears probable that the person desiring to take advantage thereof may probably be prejudiced thereby.

11. The rule that an unsuccessful challenge to a juror is waived by failure to object to the panel collected for the trial, does not apply to a challenge to the array.

12. As to whether the purpose of a person who has shot another was to take that other's life, proof that had the bullet spent its force in the direction it was discharged the result would probably have been such other's death, is competent.

13. Proof that a person assaulted another with a deadly weapon in such a way that had the effect of the assault not been turned aside by some means not reasonably to have been expected by such person, the natural and probable result would have been the death of such other, is sufficient to warrant a finding that the intention of such person in making such assault was to take such other's life.

14. Exceptions to instructions not preserved in a bill of exceptions cannot be reviewed upon appeal.

[Syllabus by MARSHALL, J.]

ERROR to review a judgment of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Affirmed.*

Plaintiff in error was duly informed against as having on the 3d day of August, 1902, at Dodge county, Wisconsin, made an assault on Ida Ullman with a loaded revolver with intent her, the said Ida Ullman, to kill and murder. In due time and form he entered a plea of not guilty, and was tried in October, 1903, in the circuit court for Dodge county.

The evidence indicated that about 7 o'clock a. m. on the day mentioned in the information the girl started from the place where she had been at work to go to her father's home, a considerable distance therefrom; that while on the journey she met her father; that about 8 o'clock a. m., while in his company on an unfrequented road in a rather secluded locality, he shot her with a revolver in a vital part of her body; that he then fled from the scene, leaving her in an apparently dangerous condition; that she was found about seven hours thereafter some five feet from where she stood when shot, so weak from loss of blood as to be helpless, and from the time of the occurrence to the time of the trial the conduct of the accused was consistent with the theory that he shot the girl intending to kill her. The jury rendered a verdict of guilty as charged. A motion to set aside the verdict and grant a new trial was seasonably and properly made to preserve for review such questions as depended thereon. The motion was overruled and judgment was rendered upon the verdict in due form of law.

J. E. Malone, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *Paul O. Husting,* district attorney, and oral argument by the *Attorney General.*

MARSHALL, J. Before impaneling the jury for the trial was commenced, counsel for the accused said he desired to "file a challenge to the array of jurors," accompanying such statement by presenting a paper in that regard, which was placed on file. Such paper was not incorporated into the bill of exceptions, neither does the bill show in any formal way the grounds of the challenge. The proceedings had in respect to the matter show pretty clearly what such grounds were. The point is made by the attorney general that such a challenge must be made in writing, stating specifically the grounds thereof, and that the writing must be embodied

in the bill of exceptions in order to enable this court to review the decision of the trial court in respect thereto. If that be correct, whether the decision overruling the challenge to the array was proper or not, is not before us.

At common law a challenge to the array was required to be made in writing, stating specifically the grounds relied on. An issue of law or fact was then formed in respect thereto, which was tried by the court, if one of law, and by triers appointed by the court, if of fact. Under our statutory system for selecting and returning jurors there is no challenge to the array in the strict common-law sense. The Code was designed to be as complete for the trial of criminal as for the trial of civil cases. It makes no provision for a challenge to the array, or for any equivalent proceeding. One is liable to fall into confusion in respect to the matter by failing to note the fact that most of the decisions in this country in Code states, where it is said that a challenge to the array must be in writing, are based on statutory requirements. In Iowa, where there is an express provision for a challenge to the entire panel, it is said that the common-law challenge to the array does not exist. *State v. Davis,* 41 Iowa, 311. It is said in cases decided in New York, California, Texas, Michigan, Minnesota, Mississippi, and other states that might be mentioned, that a challenge to the array must be in writing, but it will be found on investigation that such decisions merely follow statutory requirements. The ancient method of trying issues of fact raised on such challenge is obsolete. All issues, whether of law or fact, on an objection to the entire panel of jurors are now triable summarily by the court, whether the making of the challenge is regulated by statute or is a mere matter of practice regulated by the court. Trial courts have inherent authority, and it is their duty, to permit and give consideration to objections seasonably and properly made to the entire panel of jurors, based upon grounds specifically stated, which, if true, indicate that

the statutory method of selecting jurors was prejudicially departed from. The motion or objection may properly be, as it commonly has been in this state under the Code, called a challenge to the array. *State v. Cameron,* 2 Pin. 490; *Conkey v. Northern Bank,* 6 Wis. 447; *Perry v. State,* 9 Wis. 19. But that does not imply that it must be regarded as having all the common-law characteristics. It has only such of them as are appropriate to our judicial system. It is said in 12 Ency. Pl. & Pr. 426: "At common law a challenge to the array was required to be in writing, and where this requirement has not been abrogated by statute the rule of the common law is still in force," citing authorities from seven states, in each of which, however, the matter is regulated by statute.

There is neither any statute nor rule of court nor decisions in this state regulating definitely the practice as to objecting to the entire panel of jurors. The right to make such an objection, however, has always been recognized, and exists by well-established practice. It makes no very great difference how the question of the validity of the panel is raised so long as the grounds thereof are brought definitely to the attention of the court. It may be in the form of an objection to the entire panel, or a motion to quash the return thereof, or be made in the set phrase of a challenge to the array. Mere form is of little consequence when not necessary by statute. The spirit of the Code, generally speaking, is that the substance of things only is material. If it were the practice to make the objection only in writing and to denominate it by any particular name, and the trial court were to permit a violation thereof and entertain the matter nevertheless, unless it appeared that the adverse party was prejudiced thereby the error would be regarded as harmless under sec. 2829, Stats. 1898.

While it is good practice to make a challenge to the array, so called, in writing, since there is no statute requiring it to

be so made, and a stenographer is now a part of the regular machinery of a trial court, who is expected to take down accurately everything that occurs in the course of a trial, the reason, in the main, for the common-law rule as to the manner of presenting the challenge no longer exists. It should therefore be deemed entirely sufficient if the challenge is stated definitely at the bar of the court and taken down by the stenographer.

It was early held here in harmony with the common-law rule that the grounds of a challenge to the array should be specifically stated. *Conkey v. Northern Bank,* 6 Wis. 447. That should be regarded as the settled practice. Though the trial court has some discretion as to how specifically the grounds of challenge must be stated, the statement should be sufficiently full and definite to inform the trial court and the adverse party reasonably of the precise departures from the legal requirements relied upon. The right of challenge should be exercised before commencing to impanel the jury, otherwise it should be deemed waived. 12 Ency. Pl. & Pr. 424. No departure from that rule is permissible except for extraordinary reasons.

In this case the practice as to the time of making the objection, motion, or challenge and the manner thereof, except in that the specific grounds relied on do not appear in the bill of exceptions, the writing in respect thereto being absent therefrom, was proper. The practice of the court also in treating the grounds assigned for the challenge, not admitted by the adverse party, as at issue and summarily trying the issues, was proper. Since such grounds were not formally stated, taken down by the stenographer, and preserved in the bill, and the writing filed was not so preserved, we might properly omit consideration thereof. However, since it appears that the questions raised by the challenge were fully tried and the grounds with reasonable clearness appear from the evidence, we have concluded to treat the matter.

The evidence taken upon the trial of the issues involved in the challenge indicates that the grounds relied on were as follows: First, whereas the statute provides that the jury commissioners shall furnish the clerk of the circuit court one list of names of persons qualified to serve as jurors, to be drawn from the body of the county, each commissioner proposed and furnished a partial list, and such lists were treated as satisfying the statute. Second, the commissioners did not furnish the clerk of the circuit court a complete list of names verified or certified in proper form. Third, the clerk did not make a copy of the lists filed and deliver the same to the commissioners or any one of them. Fourth, the names furnished to the clerk as aforesaid were not written upon separate slips of paper, and the slips folded and put into a box by the clerk or his deputy, as the law requires. The facts appear to be these: Each commissioner made a list and submitted it to the three for consideration. They approved of such three lists, which in the aggregate included the requisite names, as the one list which the statute required, and delivered the same to the clerk of the circuit court. Such clerk did not make a copy of the lists so furnished and deliver the same to at least one of the commissioners, as the law requires, but each of the commissioners, to the knowledge of the clerk, preserved a copy of the list proposed by him. The law does not require the commissioners to make any verification or formal certification of the list furnished to the clerk. While neither the clerk nor his deputy wrote the names of the persons appearing upon the lists furnished, as aforesaid, on separate slips of paper, and it is not certain that either one of them folded the slips after the names were written thereon, and placed the same in a box in the presence of the commissioners, as the law requires, the names were so written by a person acting under the direction of the clerk in his presence and in the presence of the deputy and the commissioners, and the slips were then by the direction of the clerk, in his presence

and in the presence of the commissioners, either by the deputy clerk or the person who wrote the names, placed in the box. The names so written upon slips of paper and put in the box were the identical names on the list furnished by the commissioners. There is an entire absence in the record of any showing of prejudicial departure from the letter of the statute. The mere fact that each commissioner proposed a list of names for a part of the entire list to be agreed upon, and the several partial lists were approved and in that form handed to the clerk, instead of the three lists being transferred to one and in that form delivered, is of no consequence whatever. The fact that the physical acts of writing the names on slips of paper and folding such slips ready for the box and putting them therein, if such be the fact, in the whole, is likewise of no consequence, since it appears that such person acted under the immediate direction of the clerk, in his presence and in the presence of the commissioners, and there is not only no indication that there was any prejudicial departure from the statute in the matter, but there is conclusive affirmative evidence to the contrary. The general rule as to irregularities in executing the statutory method for selecting jurors is that they are to be deemed immaterial, unless it appears probable that the person seeking to take advantage thereof may be prejudiced thereby. Proffatt, Jury Trial, § 154; Thompson & Merriam, Juries, § 134; 12 Ency. Pl. & Pr. 277.

The point is made by the attorney general that in any case the challenge to the array was waived by the failure to object to the jury as a whole, reliance being placed on *Jackson v. State,* 91 Wis. 253, 267, 64 N. W. 838. The rule invoked has never been, and it seems cannot reasonably be, applied to objection to the entire panel of jurors. It only goes to objections to individual jurors. When an exception is once properly saved to a ruling on an objection to the entire panel of jurors it will be available upon a subsequent review of the

final result without further calling the matter to the attention of the trial court.

The bullet entered the girl's person near the lower lobe of the left ear and came out a little to the right of the center of the neck below the line of the hair. The wound was badly powder-burned as if the weapon were held close to the point where the bullet struck. The doctor who examined the wound shortly after it was made, and who stated that he thought he could tell from such examination the direction of the bullet at the instant it entered the girl's body, was permitted to give opinion evidence as to what would have been the natural and probable result if it had continued in such direction, and stated that such result would have been death. We perceive no error in that. The gist of the offense charged was intent to take human life. Whether the natural and probable consequence of the conduct of the accused was to effect that end bore most strongly upon what his intent in fact was. If the result had been death, produced by a deadly weapon used in such a manner as to naturally and probably so result, unexplained, the presumption would be that the accused made the assault with premeditated design to kill, and the grade of his offense murder in the first degree. *Cupps v. State,* 120 Wis. 504, 97 N. W. 210, 98 N. W. 546. It is said that there was no evidence upon which to base the question propounded to the doctor. It seems to us clearly otherwise. He testified as before indicated. He fully qualified himself to give the probable result of a bullet striking a person, as in the given case, and continuing on its course. It seems that the basis of his opinion was amply sufficient, but if it were otherwise it certainly could not well be said that the decision of the trial court on the question of competency was clearly wrong, which would be necessary to justify disturbing it. *Emery v. State,* 101 Wis. 627, 648, 78 N. W. 145.

Some complaint is made of the instructions to the jury,

but since no objections in that regard are in the bill of exceptions, none are properly before us for review.

It is said that the evidence was not sufficient to warrant the jury in finding the element of felonious intent to kill. Evidently counsel in making that point did not fully appreciate that satisfactory proof that a person assaulted another with a deadly weapon in a manner naturally calculated to probably produce that other's death, and producing it, raises a presumption, in the absence of evidence sufficient to create a reasonable doubt in respect thereto, that such result was intended and that such person is guilty of murder in the first degree. *Cupps v. State, supra.* It follows from that rule in the same circumstances, leaving out that of the accomplishment of the felonious purpose, such person would be presumed guilty, as a matter of fact at least, of assault with intent to commit the crime of murder. The jury were well warranted in concluding that the evidence was barren of any indication that—when the accused turned his revolver on his daughter and discharged it toward a vital part of her person, holding the weapon so closely thereto as to force the powder into the wound made by the bullet,—he did not have, just what such circumstances naturally indicate,—a specific intent to kill the girl. His immediately fleeing from the scene, leaving her in a lonely place apparently in a dying condition, and many other circumstances shown by the evidence point very forcibly to the felonious intent charged. It seems needless to go over the evidence in detail. Suffice it to say that it is difficult to see how the jury could have reached any other conclusion than they did.

There is no other matter referred to in the argument of counsel for plaintiff in error which seems to be sufficiently important to warrant special reference thereto.

By the Court.—Judgment is affirmed.

BATES, Plaintiff in error, vs. THE STATE, Defendant in error.

March 18—April 5, 1905.

Criminal law: Obtaining money by false pretenses: Bank draft cashed in another state: Materiality of false statements: Instructions to jury: Information: Defective counts: General verdict.

1. Defendant, by means of false pretenses, obtained a loan of moneys. No part thereof was paid directly to him, but upon his request that the moneys be sent to two persons designated by him the lender's agent bought bank drafts and mailed them to such persons. These transactions took place in this state, in the county in which the venue was laid. Upon one of said drafts the person to whom it was sent, a creditor of defendant, obtained the money in Iowa. There was no evidence as to what became of the other draft. *Held*, that these facts did not warrant a conviction under an information charging the obtaining of money by false pretenses in said county. MARSHALL, J., dissents.
2. In a prosecution for obtaining money by false pretenses, defendant's representations as to the value of his land upon which he obtained a loan were immaterial as being mere expressions of opinion, but his statements of specific facts as to what he paid for the land were material, although their effect was merely to convince the lender of the value of the land.
3. An additional instruction to the jury, given after they had once retired, to the effect that if they found any one of the alleged false pretenses, that would suffice, with the qualifications given in the original charge, is *held* not erroneous as omitting the qualification, previously given, that the misrepresentation must have been material.
4. A count in an information for obtaining money by false pretenses charging that the money was obtained from H. P. P. & Son is bad, in that it fails to specify any person from whom the money was obtained.
5. A general verdict of guilty will be ascribed to the good counts in an information, where there is nothing in the instructions or otherwise to indicate that it was addressed to bad counts.

ERROR to review an order of the circuit court for Vernon county: J. J. FRUIT, Circuit Judge. *Reversed.*

Plaintiff in error, hereinafter called "defendant," was charged by information under sec. 4423, Stats. 1898, for that in Vernon county, Wisconsin, by various specified misrepresentations as to the amount, quality, characteristics, and cost of a tract of land in Crawford county, Wisconsin, on which he desired a loan, he did receive and obtain from H. P. Proctor, the agent of one Nicholas Senn, "the sum of $1,500 of the money and property of said Nicholas Senn, with intent then and there to defraud;" the information further alleging the falsity of the representations to the knowledge of the defendant, and the credence thereof by said Proctor. Another count alleged substantially the same facts, with the additional one that the defendant at the same time made a written statement or application for loan embodying most of the representations. Two other counts were identical with those described, except that they alleged the representations were made to and deceived "H. P. Proctor & Son," the agents of Nicholas Senn, and that he received and obtained the said sum from them. Upon the trial there was proof of the making of the representations to H. P. Proctor, of their falsity, and his reliance thereon, and that in reliance thereon said Proctor awarded the defendant a loan of $1,500 out of the moneys of said Senn, then in his hands as agent to loan the same; that out of the said loan Proctor retained $50 for his commission, and was requested by the defendant to send the balance of the money, $970 thereof to one Bascom, of Lansing, Iowa, to whom defendant was then indebted for that amount of the purchase price, and the remainder, $470.75, to one Haggerty at Farryville, in Crawford county, Wisconsin. Proctor accordingly drew and signed checks of his firm, went to the bank where his firm kept a deposit, and purchased two drafts of that bank on another bank for the above-mentioned amounts, less exchange, and mailed them to the respective persons above mentioned at their postoffice addresses. There was evidence that Bascom got the money on the draft

mailed to him at Lansing, Iowa. There was no evidence as to what became of the draft to Haggerty.

Defendant, at the close of the state's evidence, moved for nonsuit or direction of verdict, but after such motions were overruled he introduced evidence in defense, and did not renew them at the close of all the testimony. After a general verdict of "guilty as charged," the defendant moved for a new trial for errors in the instruction and in the admission and exclusion of evidence, and because the verdict of the jury was ambiguous and not specific, and because it was against the evidence and contrary to law, which motion was denied. For review of such order defendant sued out writ of error.

For the plaintiff in error the cause was submitted on the brief of *C. J. Smith.*

For the defendant in error there was a brief by the *Attorney General* and *Frank T. Tucker,* second assistant attorney general, and the cause was argued orally by *Mr. Tucker.*

DODGE, J. The first assignment of error is that the evidence did not establish the offense. The charge was of obtaining from H. P. Proctor, as agent, the sum of $1,500 of the money and property of Nicholas Senn. That this charges the obtaining of money specifically there can be no doubt. "The sum of $1,500" to the ordinary intelligence means money. To nothing else is the expression applicable. *State v. Ryan,* 34 Wash. 597, 603, 76 Pac. 90; *Comm. v. Howe,* 132 Mass. 250. Indeed, if it charged the obtaining of any other property, the information would be bad for lack of any allegation that such property was of value. What, in fact, was accomplished by means of the alleged representations, after inducing Proctor to accede to a loan on account of his principal, Senn, was that Proctor made out and signed two checks in the name of his firm, which he took to the bank, and from the bank obtained two drafts—one for $470.75,

payable to the order of H. P. Proctor & Son; the other for $970, payable to the order of the Bank of Lansing, Iowa. The first of these Mr. Proctor mailed to one Haggerty, and the other he says he sent to one Bascom, but probably sent it to the Bank of Lansing, with directions to pay the money to Bascom upon delivery of the title deeds of the land mortgaged. These steps he took upon the request of the defendant merely that he send $970 of the loan money to Mr. Bascom and the balance to Mr. Haggerty, not prescribing the method of transmission.

Upon this state of facts it is, of course, apparent that the defendant never did personally obtain from Mr. Proctor any money, and the question is whether the transaction above described can in any way constitute the equivalent for that statutory description of the offense with which he is accused.

The gravamen of the crime is the obtaining of the property described, as will be shown by the authorities hereinafter cited upon the question of the place of the crime. This statute, like other criminal statutes, must receive strict construction. *State v. Kube,* 20 Wis. 217, 225; *State v. Black,* 75 Wis. 490, 44 N. W. 635; 2 Bishop, New Crim. Law, § 415; *People v. Poucher,* 30 Hun, 576. This for at least two practical objects: First, that the accused may be unambiguously notified of the acts charged, in order to prepare his defense; and, secondly, to the end that in case of either conviction or acquittal he shall not be subject to be again put in jeopardy for the same offense for which he has been once tried. In pursuance with that view it has been held that the proof must establish the obtaining of the very property alleged in the information, or some part of it; that an allegation of obtaining money is not satisfied by proof of obtaining some other property, even so nearly the equivalent of money as evidences of money indebtedness or orders to pay money. *Schleisinger v. State,* 11 Ohio St. 669; *Baker v. State,* 31 Ohio St. 314; *Comm. v. Howe,* 132 Mass. 250; *Comm. v.*

Wood, 142 Mass. 459, 8 N. E. 432; *Reg. v. Brady,* 26 U. C. Q. B. 13; *People v. Haynes,* 14 Wend. 546. Other illustrations of the necessity that money, as such, should actually pass from the hand of the defrauded person to that of the accused in order to support the charge of obtaining money, are numerous. Thus, fraudulently obtaining consent to the entry of a judgment against a city is held not sufficient, although the judgment be afterward paid, and the money actually received by accused, without further misrepresentation (*Comm. v. Harkins,* 128 Mass. 79); procuring a pre-existing account to be receipted and balanced (*Comm. v. Usner* [Pa.] 6 Lanc. Law Rev. 121; *Moore v. Comm.* 8 Pa. St. 260); or obtaining indorsement of credit on a note (*Reg. v. Eagleton,* 1 Jur. N. S. 940, 944; *State v. Moore,* 15 Iowa, 412); obtaining a credit entry to one's account with his banker (*Rex v. Wavell,* 1 Moody C. C. 224); obtaining transfers of accounts so as to result in a credit to the accused (*Reg. v. Crosby,* 1 Cox C. C. 10; *Jamison v. State,* 37 Ark. 445). Obtaining shipping receipt does not support charge of obtaining the goods (*People v. Haynes, supra*); charge of obtaining property not supported by obtaining board and lodging (*State v. Black, supra*).

The absolutism of the necessity for actual physical tradition from the accuser to the defendant personally was early relaxed to the extent of holding that a delivery to a person designated by the defendant to receive for his benefit would suffice. *Reg. v. Jones,* 1 Den. C. C. 551; *Sandy v. State,* 60 Ala. 58; *Comm. v. Taylor,* 105 Mass. 172; *Comm. v. Wood,* 142 Mass. 459, 8 N. E. 432; *Comm. v. Karpowski,* 167 Pa. St. 225, 31 Atl. 572; *Comm. v. Schmunk,* 22 Super. Ct. (Pa.) 348; *S. C.* 207 Pa. St. 544, 56 Atl. 1088. This was on the theory that defendant expressly constituted the person so designated his agent, and that by such delivery the property passed out of the title, possession, and control of the accuser and into that of the defendant as completely as if the

physical delivery had been to the latter in person. In *Comm. v. Karpowski, supra,* the Pennsylvania court dispensed with express designation of the recipient and assumed analogy with the rule applicable to mere technical passage of title upon sale of goods by delivery to any public carrier, by raising an implication of agency from general mercantile custom. This analogy was declared false, however, in *Comm. v. Schmunk, supra,* and such a delivery held not a consummation of the crime of "obtaining" the property, because the accuser had power to reclaim it at any time before actual delivery to the defendant if he discovered the fraud; hence it had not been fully obtained from the former by delivery to the carrier. That principle, that so long as the defrauded party retains either title or control over the property the crime of obtaining is not consummated, has general support both in reason and authority. *Reg. v. Watson,* D. & B. 348; *State v. Anderson,* 47 Iowa, 142; *Fenton v. People,* 4 Hill, 126; *Reg. v. Evans,* L. & C. 252; *State v. McGinnis,* 71 Iowa, 685, 33 N. W. 338; *Moore v. Comm., supra; State v. Moore, supra.*

Testing the transaction above narrated by these established rules of law, obviously defendant did not obtain by delivery to himself any money, nor, indeed, anything else. If the evidence were sufficient to establish such a direction to Proctor to deliver drafts or money at the postoffice as to constitute an agency in the officials (of which no opinion is expressed), still it would not be until that delivery was made that anything was obtained by defendant or parted with by Proctor. If at any moment prior to that delivery the latter had learned of the falsity of the representations, and therefore ceased to rely on them, he would at that moment have been in possession of everything which he ever had; he would have parted with nothing, and defendant would have acquired neither to himself nor to any one else anything which Proctor previously had. And if, after learning of the fraud, he persisted

in mailing the drafts, his parting with them would not have been in reliance on the false pretenses. If, then, we could consider the delivery to the postoffice the point of time at which Proctor parted with something to defendant, there would still be no obtaining of money, but merely of orders to pay money—an entirely different article of property, for the obtaining of which defendant could be prosecuted notwithstanding either a conviction or an acquittal of obtaining money. *Comm. v. Coe,* 115 Mass. 481. Of this offense defendant is not here charged and cannot be convicted. Very clearly, then, if money was obtained at all by defendant, it was when it was paid to either Haggerty or Bascom by defendant's direction, through the medium of various intervening steps taken by Proctor to carry out that direction. Whether or not an offense of obtaining a draft or check is committed, the crime of obtaining money may also be committed when such order is paid. *Comm. v. Wood, supra; State v. Palmer,* 40 Kan. 474, 20 Pac. 270; *Burton v. U. S.* 196 U. S. 283, 25 Sup. Ct. 243.

There is no evidence that the Haggerty draft ever was paid, so that may be dismissed from further consideration, for proof of obtaining part of the money or property described will justify conviction. *Comm. v. Howe, supra.* There is proof that Bascom actually received money by virtue of these transactions. Whether that was accomplished by his cashing a draft payable to him, or by payment to him by the Bank of Lansing upon delivery by him of title deeds, is probably immaterial here, though it might be material on the question whether defendant obtained the draft. The latter is much more probable, for the draft was payable to the bank, and the sending of money to a stranger, merely accompanied by request for title deeds in his possession, would not accord with the ordinary precautions of a careful business man, such as Proctor seems to be. Whichever method was adopted, the payment was made in Iowa. There, for the first time, did

any money pass to the defendant or to any one for him. Obtaining the money is the crime charged, of which the false pretenses are only the means. By all the authorities the crime is committed and must be prosecuted where the property was obtained. *State v. Shaeffer,* 89 Mo. 271, 1 S. W. 293; *Connor v. State,* 29 Fla. 455, 10 South. 891; *Graham v. People,* 181 Ill. 477, 55 N. E. 179; *Comm. v. Schmunk, supra;* 8 Ency. Pl. & Pr. 858; *Rex v. Buttery,* cited 1 Den. C. C. 551. Neither a conviction nor an acquittal here of the crime of obtaining money in Vernon county, Wisconsin, would be any defense to a prosecution for obtaining this money in Iowa. We are convinced that the evidence, most favorably considered, wholly fails to show that the defendant obtained from Proctor any money in Vernon county, and that the verdict of guilty upon that charge cannot stand.

Under two of the assignments of error it is claimed that the court admitted evidence and allowed consideration by the jury of certain facts—notably that the defendant overstated the amount he paid for the land—which are claimed to have no relevancy except as bearing upon the value of the premises. In this we can discover no error. The value of the premises was material to be considered by Proctor in deciding whether to part with the money. Counsel seems to confuse the fact of value with defendant's representations as to that fact. The latter are deemed immaterial because they are mere matter of opinion, and a person to whom they are made has no right to rely thereon. Quite the contrary statements of specific facts, although their effect is to convince the hearer merely of the value of the property which he buys or on which he loans. *Comm. v. Wood,* 142 Mass. 459, 8 N. E. 432.

It is claimed that the court, in instructing the jury, after they had gone into consultation, as to the representations which they must find in order to convict, omitted all the qualifications, including that of materiality. We do not think this error well assigned, for the court's statement was merely that,

if they found any one of the alleged false pretenses, that would suffice, with the qualifications given in the original charge. We do not think the jury were misled from their previous information that the misrepresentation must have been material.

Reference to H. P. Proctor as the agent of Nicholas Senn is complained of, but without reason, for the testimony of Proctor that he was such agent was wholly uncontradicted.

Further error is assigned on the contention that the verdict is not specific, being general, while there are four counts; two charging that the money was obtained from H. P. Proctor, and two that it was obtained from H. P. Proctor & Son. This objection might be serious if all four counts were good, for an allegation of obtaining money from one person is ordinarily inconsistent with obtaining it from another; but we are convinced that the two counts which charge that it was obtained from H. P. Proctor & Son are bad in failing to specify any person who was deceived or from whom the money was obtained. The words "H. P. Proctor & Son" mean nobody. Of themselves they exclude the idea of an individual, and suggest either a corporation, which would be a legal person, or a firm or copartnership, which is not a legal person. To make such counts good it should have been charged that the representations were made to, and the money obtained from, the persons who composed that firm, although the allegation that they were copartners might have been proper to establish the agency of the one person with whom the transaction was had. *People v. Fish,* 4 Parker, Crim. R. (N. Y.) 206; *State v. Woodson,* 5 Humph. 55; *Burd v. State,* 39 Tex. 509; *State v. McChesney,* 90 Mo. 120, 1 S. W. 841. A general verdict of guilty will ordinarily be ascribed to the good counts, nothing appearing in instructions or otherwise to indicate probability that it was addressed to bad counts. *State v. Kube,* 20 Wis. 238. In this case the counts referring

to H. P. Proctor & Son were practically eliminated by undisputed proof and by instruction that H. P. Proctor was the agent of Senn.

No other assignments of error seem to demand consideration. That first discussed necessitates a new trial.

By the Court.—Order denying motion for a new trial reversed, and cause remanded with directions to grant that motion.

MARSHALL, J. (*dissenting*). To constitute the crime of obtaining money under false pretenses these circumstances are essential: First, a false statement of past or existing facts by one person to another. Second, such statement must be reasonably calculated to deceive that other. Third, it must be so designed and induce such other to part with his money. Fourth, such design must be accomplished, such other relying upon such false statement. Fifth, he must part with his money within the jurisdiction where the offense is laid. It is not necessary that the false statement of facts be made directly by such person to such other. It may be made through the medium of an innocent agent. 2 Bishop, New Crim. Law, § 473. It is not necessary that the guilty party shall receive the money or derive any benefit therefrom. The element of obtaining the money designed to be obtained is accomplished when the person sought to be defrauded is actually induced to part absolutely with his right of property in the object of the deceit. *Musgrave v. State,* 133 Ind. 297, 32 N. E. 885; *Comm. v. Harley,* 7 Met. 462. The element of parting with property is satisfied the instant the person designed to be defrauded, through the means resorted to to accomplish such design, actually parts with his property right. Parting with it by placing the property beyond his reach and under the control of the guilty party or his agent completes the offense,—completes it at the place where

such parting with control occurs. *Norris v. State,* 25 Ohio St. 217; *State v. Lichliter,* 95 Mo. 402, 8 S. W. 720; *Comm. v. Wood,* 142 Mass. 459, 8 N. E. 432.

Delivery of property to a common carrier consigned so that title passes at the point of such delivery to the consignee, or delivery of money, or a draft representing the money sought to be obtained, in the United States postoffice, so that the right to the money thereby passes from the control of the owner, is a complete deprivation of such owner thereof. The means, in a physical sense, by which the money is obtained, so long as the owner thereof voluntarily parts therewith, is immaterial. If he is induced to purchase a draft with the money and send the same to some one designated by the guilty party at a distant point by means of the United States mail, as in *Comm. v. Wood, supra,* or is induced to issue an order or check which the guilty party causes to be presented and paid, as in *Roberts v. People,* 9 Colo. 458, 13 Pac. 630; *State v. Palmer,* 40 Kan. 474, 20 Pac. 270, the design by false pretenses to obtain the money and the accomplishment thereof is complete, and complete at the point where the money is in fact parted with.

The foregoing to my mind leaves no doubt as to the evidence in this case establishing the offense charged. The accused made false representations as to existing facts for the purpose of defrauding Senn out of his money. Senn, through his agent, relied on such false statements and was thereby induced to part with the money. The design was fully accomplished by the accused inducing Senn's agent to use the money sought to be obtained by purchasing two drafts therewith and sending the same through the United States mails to two persons designated. Such agent in purchasing the drafts was the agent of the accused and used his money for that purpose. As soon as Senn's money was converted into that of another by means of the purchase of the drafts and the deposit thereof in the United States postoffice and thereby

placed entirely beyond his control, it was obtained from him within the meaning of the statute. It was obtained by the accused. It was obtained through false pretenses. It was obtained at the place where the title thereto and the control thereof was parted with by Senn, through his agent. *The accused obtained the money. Senn lost it, and lost it within the jurisdiction where the offense was laid.* Upon principle and within the authorities cited, particularly *Comm. v. Wood, supra,* it seems to me the accused was properly convicted and that the judgment should be affirmed.

STEWARD, Plaintiff in error, vs. THE STATE, Defendant in error.

March 20—April 5, 1905.

Criminal law: Evidence: Rebuttal: Discretion: Insanity: Special issue: Form of verdict: Sanity at time of trial: Duty to make inquisition: Instructions: Court and jury.

1. Where evidence offered as rebuttal is not strictly such, being upon a subject fully gone into in the evidence in chief, its admission or exclusion rests largely in the discretion of the trial court, and the judgment will be reversed only for abuse of such discretion.
2. Sec. 4697, Stats. 1898, does not prescribe the form of verdict upon the special issue of insanity, but only requires that the question of insanity or reasonable doubt of sanity shall be submitted in some form. Refusal to submit a form of verdict, requested by defendant, that there was reasonable doubt of his sanity at the time of the alleged offense and that he was not guilty for that reason, was not error, where the jury were properly instructed as to the burden of proof and as to reasonable doubt of sanity, and one of the forms submitted to them was in effect the same as that requested.
3. Under sec. 4700, Stats. 1898, it is the duty of the trial court, at any stage of the proceedings, upon proper application, if informed that there is a probability that defendant is then in-

sane, to make inquisition and determine that question before another step is taken in the trial, even though delay and embarrassment in the regular proceedings of the court should thereby result.

4. The verdict of the jury on the special issue, that defendant was sane at the time of the alleged offense, is not a determination of his sanity at the time of the trial.
5. Denial of inquisition as to defendant's sanity at the time of the trial upon the ground that the application therefor came too late is not a determination that he is sane at that time.
6. An instruction, in a criminal case, that the jury should not find defendant insane on the ground alone that he had been in the habit of telling exaggerated stories, or had manifested symptoms of melancholy, moroseness, mental exaltation or depression, or for any mere eccentricity or peculiarity, was an invasion of the province of the jury; and the error was not cured by the statement that such acts and symptoms might be taken into consideration in determining the question of insanity.
7. Evidence of acts and symptoms such as are above mentioned is *held* in this case sufficient to sustain a verdict of insanity. *Chafin Will Case*, 32 Wis. 557, distinguished.

ERROR to review a judgment of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Reversed.*

On the 28th day of January, 1901, at the city of Stanley, Chippewa county, while the wife, two daughters, grandchild, and son-in-law of plaintiff in error were seated at dinner at the home of the son-in-law, Fred Miller, the plaintiff in error, then about sixty years of age, entered the rooms so occupied and shot and mortally wounded said Miller without any apparent motive therefor. Plaintiff in error was arrested, and the information charged him with the crime of murder in the first degree. A special plea of insanity was interposed. Upon such issue the jury rendered a verdict that at the time of commission of the alleged offense plaintiff in error was not insane. On the coming in of such verdict, counsel for plaintiff in error, upon information received from medical experts during the trial on the insanity issue, immediately informed the court that there was probability plaintiff in error was then insane and incapacitated to act

for himself, and asked for an inquisition, as provided by sec. 4700, Stats. 1898. Thereupon an order was entered denying the application upon the ground that it came too late. The trial then proceeded upon the information charging murder in the first degree, which resulted in a verdict of guilty. Motions in arrest of judgment and for new trial were made and denied, to all of which due exceptions were taken by plaintiff in error. Thereafter judgment of conviction was pronounced, and plaintiff in error sentenced to the Wisconsin state prison for the term of his natural life, from which judgment and conviction a writ of error was sued out and the record removed to this court.

The testimony produced on the trial tended to show that for a period of about thirteen years immediately subsequent to 1874 the plaintiff in error was employed at Badger, Wisconsin, in a mill, and while so engaged was struck upon the head by a bursting pulley and injured, of the effects of which he subsequently complained; that he went from Badger to Eau Claire, where he continued in the same line of employment, as a sawyer in a mill, until about seven or eight years prior to the homicide. While working in said mill he complained of his head aching, and was frequently laid off on that account, complained of trouble with his head, and ceased sawing in the mill on account of difficulty with his head. While working in the mill he had family troubles; would tell about them and cry. After ceasing work in mill at Eau Claire, he remained there about a year and a half without any particular employment; then went to New York; remained there about three years. While in New York he committed so many insane acts that a party wrote to the chief of police at Eau Claire relative to his conduct and requesting that he be taken care of. He returned to Eau Claire, found employment working in the woods in the winter seasons, and other seasons upon a small tract of land near Eau Claire. At times he would sit with his head down, ap-

parently in deep study, jump up suddenly, dance on the floor, sit down again, saying nothing unless spoken to, the expression of his countenance at such times being peculiar. Although the character of his wife was beyond reproach, he imagined she had run away with another man and was an inmate of a house of ill repute; imagined she was dead, and cried about it. People said he was crazy. The police officers considered him insane on Saturday preceding the homicide, which occurred on the following Monday. A cousin of his was committed to an insane asylum, and one of his brothers was considered insane. He was formerly lively, bright, and active. His condition was greatly changed during a period of eight or ten years preceding the homicide. He walked with his head down, passed people without noticing them; sometimes quiet, other times very talkative; his conversations incoherent and disconnected. While working, talked to himself. Sat around at times as though brooding over trouble, and had peculiar expression in his eyes. Would walk the streets in the nighttime, head down, talking to himself. About October, 1900, he went to Stanley, where he remained until a week before the homicide, during which time he worked in a laundry with deceased, lived with deceased, and spoke well of him. He and his wife, and deceased and his wife, lived in the same home. On Saturday preceding the homicide he requested an officer at Eau Claire to lock him up.

At 11 o'clock on day of the homicide, before taking the train at Eau Claire for Stanley, he had conversation with police officer, shook hands with him, bade him good-by, said he was going away, and probably officer would not see him again. After getting on the train he stated to an acquaintance that he was going to New York, appeared absent-minded, dazed, and had peculiar expression in his eyes. After arrival at Stanley, and a few minutes before homicide, he met an acquaintance, to whom he stated he would see him

later; appeared to be in a hurry and nervous. He went into the house of deceased, where family was seated at dinner, and said to deceased, "Fred, you have got to die. You have got to die," and shot him. His daughter, wife of deceased, said, "Now, pa, see what you have done," and he responded, "Never mind; I have something more." After the homicide, and when the officers came to the house of deceased to arrest him, he put his arms around his daughter's neck and said he wanted to kiss her, and kissed her. Immediately after the homicide he was cool, acting as though nothing had happened, made no effort to escape, and, when asked why he did the shooting, said, "I don't know; I loved the boy and loved the daughters." Immediately after the homicide, and after he was taken to the police station, an old acquaintance, whom he met and called by name a few minutes prior to the homicide, saw him, and he failed to recognize him. While at the station, and about three hours after the homicide, he appeared cool and collected, and remarked to several people who had gone to the station to see him that there must be some curiosity that people collected there, and said if the officer would take him out on the street he would exhibit himself; showed no remorse, did not seem to be excited in any way, and did not seem to realize that he had committed any crime.

The testimony further shows that he had exaggerated delusions of wealth, of being a detective, of being the owner of large properties, offering to pay bills of others in whom he had no interest, claiming he had large amounts of money on his person when he had none, placing exorbitant values on valueless papers, and putting them in a safe for safe-keeping, manifestations of undue and abnormal suspicions, suspicions that he was being robbed, visionary schemes, wanting to rent rooms for factory, delusion about having half a million dollars, offering to buy valuable properties. Medical experts testified to his insanity, based upon these delu-

sions and peculiarities which were testified to upon the trial. Several nonexperts who met him frequently, knew him well, and conversed with him pronounced him insane.

W. H. Stafford, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *Walter D. Corrigan* and *Frank T. Tucker,* assistant attorneys general, and oral argument by *Mr. Corrigan.*

KERWIN, J. 1. It is contended that the court erred in excluding the testimony of Dr. Ellenson. After the plaintiff in error had proved his case on the special issue of insanity and the state had put in its testimony in reply and rested, the plaintiff in error called Dr. Ellenson and asked him whether the plaintiff in error was sane or insane. This evidence was objected to on the ground that it was not rebuttal, and excluded, and the plaintiff in error claims this was prejudicial error. It appears from an examination of the evidence that this subject had been fully gone into by the plaintiff in error in his evidence in chief. Several witnesses were called on the question as to whether he was sane or insane for some time before and up to the time of the trial. The evidence offered, therefore, was not strictly rebuttal (*Schissler v. State,* 122 Wis. 365, 99 N. W. 593), and the admission or exclusion of it rested largely in the discretion of the trial court, and, such discretion not having been abused, no reversible error was committed (*Schissler v. State, supra;* Jones, Evidence, §§ 809–811; *McDermott v. C. & N. W. R. Co.* 85 Wis. 102, 55 N. W. 179).

2. Error is assigned because the court refused to submit a form of verdict on the question of insanity to the effect that there was reasonable doubt of the sanity of plaintiff in error at the time of the commission of the alleged offense, and that he was not guilty of the offense charged against him for

that reason. Counsel relies mainly upon the portion of sec. 4697, Stats. 1898, which reads as follows:

"And if such jury shall find upon such special issue that such accused person was so insane, or that there is a reasonable doubt of his sanity at the time of the commission of such alleged offense, they shall also find him not guilty of such offense for that reason."

Counsel cites no authority upon this point except the statute, which does not prescribe the form of verdict, the obvious meaning of it being that the question of insanity or reasonable doubt of sanity should be submitted to the jury in some form. The jury was carefully instructed on the question of burden of proof and of reasonable doubt as to the sanity of accused at time of commission of the alleged offense. Besides, it appears from the record that three forms of verdict were submitted to the jury, one on behalf of the state, and two by the plaintiff in error; one of those submitted by plaintiff in error presenting the issue in effect the same as requested, and being sufficient in form. We therefore find no error in the submission of the question of insanity to the jury.

3. Error is assigned because the court denied application for inquisition as to sanity of plaintiff in error at the time of trial. This application was made immediately after trial on the special issue of insanity, and as soon as counsel for plaintiff in error had been informed that there was a probability that the accused was then insane and incapacitated to act for himself. The application was denied by the court on the ground that it came too late. Sec. 4700, Stats. 1898, provides:

"When any person is indicted or informed against for any offense if the court shall be informed, in any manner, that there is a probability that such accused person is, at the time of his trial, insane and thereby incapacitated to act for himself, the court shall, in a summary manner, make inquisition thereof by a jury or otherwise as it deems most proper. . . ."

This statute fixes no time for making such application, nor can it be gathered from it that the legislature intended it should be made at any particular time. In tracing the history of the law from early times, as well as the judicial construction given legislation upon this subject, it seems obvious that the legislature intended by the broad language used that the application might be made at any time during the progress of the trial without particular formality. In the absence of statute to the contrary, application for inquisition to determine whether accused is insane at time of trial can be made by counsel orally. 2 Bishop, New Crim. Proc. § 666; *Reg. v. Southey,* 4 Fost. & F. 864; *State v. Reed,* 41 La. Ann. 581, 7 South. 132. Blackstone in his Commentaries, book 4, p. 24, says:

"Also if a man in his sound memory commits a capital offense, and before arraignment for it he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried, for how can he make his defense? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed; for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution."

The most distinguished writers on criminal jurisprudence concur in these humane views, and agree that no person in a state of insanity should ever be put upon his trial for an alleged crime, or tried or made to suffer the judgment of the law, while insane. 1 Hale, P. C. 34; 4 Bl. Comm. 395; 1 Chitty, Crim. Law (ed. 1847) 760, 761; 1 Russell, Crimes (ed. 1845) 14; 4 Harg. State Trials, 205; 2 Bishop, New Crim. Proc. § 666. Our statute is an affirmance of these humane principles of the common law, and the reason upon which it rests makes manifest the intention of the legisla-

ture. It is therefore very clear that the legislature in enacting this statute, broad and general as it is, intended to place a safeguard around the accused, so that at any time during the progress of the trial, when it appeared there was reasonable doubt as to his sanity, the court should grant inquisition and determine in some way that issue. It was not necessary that the issue should be tried by a jury. It was within the power of the legislature to prescribe the mode of trial, and, the statute having left it to the court, it was entirely proper that the court should hear and determine the issue without the intervention of a jury. *Nobles v. Georgia,* 168 U. S. 398, 18 Sup. Ct. 87; *Crocker v. State,* 60 Wis. 553, 19 N. W. 435. The authorities appear to be quite uniform that at any stage of the proceedings in a criminal case, when the matter of the present insanity of the accused is properly brought to the attention of the court, the question should be determined before another step is taken in the trial. *State v. Arnold,* 12 Iowa, 479; *Nobles v. Georgia,* 168 U. S. 398, 18 Sup. Ct. 87; *Crocker v. State,* 60 Wis. 553, 19 N. W. 435; *People v. Ah Ying,* 42 Cal. 18; *State v. Reed,* 41 La. Ann. 581, 7 South. 132; *State v. Peacock,* 50 N. J. Law, 34, 11 Atl. 270; *Taffe v. State,* 23 Ark. 34; *People v. Farrell,* 31 Cal. 576; *Youtsey v. U. S.* 97 Fed. 937, 38 C. C. A. 562; *Frith's Case,* 22 How. St. Tr. 311. We are therefore of the opinion that it was the duty of the court to grant inquisition and determine whether plaintiff in error was in a fit state to be tried.

It is claimed on the part of counsel for the state that the question of insanity at time of trial was, in effect, tried, because testimony was admitted concerning the sanity of plaintiff in error up to time of trial. This contention cannot be sustained. The application on the part of plaintiff in error for inquisition was made after the evidence was in on the special issue of insanity and as soon as counsel for the prisoner discovered that there was a probability accused was at

the time of trial insane. Besides, it cannot be said that the issue of insanity at the time of trial was determined by the jury, because the verdict was confined specifically to insanity at the time of commission of the alleged offense. It would be an unsafe rule to adopt that a finding of sanity at a time long anterior to trial should determine the sanity of the accused at the time of trial.

It is also claimed on behalf of counsel for the state that to give the statute a construction which would permit the trial of such an issue at any stage of the proceeding would greatly obstruct and embarrass the administration of the criminal law. Since this matter could have been determined by the court without the intervention of a jury, and proceedings on the main issue suspended pending such investigation, it would not seem that there are strong grounds for such claim. And, even though it should occasion delay and some embarrassment in the regular and orderly proceedings of the court, yet we do not think this is a sufficient answer when the rights and liberties of a citizen are at stake. Delay and embarrassment in the ordinary proceedings of a criminal trial are not sufficient ground to deprive a citizen accused of crime of his constitutional right to be heard in his own defense. And if he be insane, he is incapacitated under all the authorities to be heard or to make a defense. We are convinced, therefore, that under this statute the court was bound to determine in some manner the question of the insanity of the plaintiff in error when a proper application was made for such purpose. It appears from the record that the insanity was discovered during the trial, and a proper application made as soon as possible, and not denied because it was insufficient, but because the court ruled it came too late.

It is further contended on behalf of the state that the court did determine that plaintiff in error was sufficiently sane to be tried. We do not think this position tenable. It is true the court made such an intimation, but decided the applica-

tion for inquisition exclusively upon the ground that it came too late, placing the refusal solely upon that ground, and refrained from deciding the question of insanity at time of trial. We are therefore of the opinion that the plaintiff in error was entitled to have the question of his insanity at the time of trial determined, and that the denial of inquisition for that purpose was error.

4. Error is assigned because of the following instruction to the jury:

"You should not find the defendant insane on the ground alone that he had been in the habit of telling exaggerated stories, or that he has manifested symptoms of melancholy, moroseness, mental exaltation or depression, or for any mere mental eccentricity or peculiarity."

The question of insanity was for the jury. It was an inference to be deduced from the facts and circumstances disclosed by the evidence, and the facts and circumstances from which the jury must necessarily have determined whether or not the accused was insane consisted in a large degree of exaggerated stories, symptoms of melancholy, moroseness, mental exaltation or depression, mental eccentricity, or peculiarity. In fact, such characteristics were the controlling elements from which the jury should determine the sanity or insanity of the accused. Such characteristics might have been so pronounced as to warrant the jury in finding the accused insane. The court told the jury that they could not find the accused insane because of the existence of such characteristics, and, in effect, took from them the principal question in the case. Counsel for the state contends that this instruction was cured because the court stated in the same connection that such acts and symptoms might be taken into consideration in determining the insanity, but we do not think this cured the error. It was clearly the province of the jury to determine whether or not such characteristics, which in this case constituted the main evidence of insanity,

were sufficient to warrant them in finding the accused insane. Counsel for the state reviews at length the entire charge, for the purpose of showing that, taken as a whole, it fairly presented the question of insanity to the jury, but we are unable to see that the instruction complained of was not prejudicial to the accused. It told the jury plainly and unequivocally that the principal facts in evidence tending to show the insanity of the plaintiff in error were not sufficient for that purpose, and that they could not find him insane upon such evidence. Counsel also contends that such facts were not sufficient to warrant the jury in finding the accused insane under the decision of this court in *Chafin Will Case,* 32 Wis. 557. An examination of the *Chafin Will Case* will show that the testimony to prove insanity there was very different from the testimony in the case at bar. It was there held that belief in spiritual mediums, faith in the statements of professed clairvoyants, belief in witchcraft, and professions of a sinless life were not evidence of insanity. Other peculiarities proved were in reality no stronger evidence of insanity. Without pursuing the subject further, it may be said that the facts in the *Chafin Will Case* were very different from the facts in the case at bar.

After a careful examination of the record we are satisfied that the evidence was ample to sustain a verdict of insanity. We must hold that the court erred in denying inquisition as to sanity of plaintiff in error at the time of trial, and in the instruction complained of.

By the Court.—The judgment of the court below is reversed, and the cause remanded for a new trial. The warden of the state prison at Waupun is directed to deliver the plaintiff in error to the sheriff of Chippewa county, to be held in custody until discharged according to law.

MURPHY, Plaintiff in error, vs. THE STATE, Defendant in error.

March 20—April 5, 1905.

Criminal law: Arrest and examination: Complaint on information and belief: Bribery: Official action of common councilor: Grand jury: Evidence of proceedings: Immunity of witness: Testimony of accomplices: Instructions to jury.

1. The formal written complaint under sec. 4776, Stats. 1898 (relating to the arrest and examination of offenders), may be upon information and belief, even when the offense charged therein is a felony.
2. Even though an ordinance pending before a city council attempts to grant a privilege which in law the council has no right to grant, yet if it deals with a subject over which the council has jurisdiction and the members of the council have a right to vote thereon, the voting on such ordinance is action by such members in their official capacity, and if one of them receives money from any person under an understanding or agreement that his vote, judgment, or action on the matter shall be influenced thereby, he is guilty of an offense under sec. 4475, Stats. 1898.
3. Testimony of grand jurors and of the district attorney as to statements made before the grand jury, and the minutes of the grand jury's proceedings, are admissible as original evidence upon a subsequent trial in court, if not objectionable under the ordinary rules of evidence, whenever the court deems it necessary for the ascertainment of truth and in furtherance of justice; and especially is a defendant entitled to introduce such evidence for the purpose of sustaining a claim (under sec. 4078, Stats. 1898, as amended by ch. 85, Laws of 1901) to immunity from the prosecution because of his having testified before the grand jury concerning the matter for which he is being prosecuted.
4. The statutes (secs. 2553–2555, Stats. 1898) do not abrogate the common-law rules as to the competency of the evidence above mentioned.
5. Refusal to give requested instructions is not error where the general charge sufficiently and properly covers the points embraced in them and correctly informs the jury of the rules of law applicable thereto.

6. Refusal to instruct the jury that they would not be warranted in convicting defendant, because the evidence relied on to establish guilt is the uncorroborated testimony of accomplices in crime, is *held* in this case not to have been an abuse of discretion, the testimony being amply sufficient to sustain the verdict of guilty.

ERROR to review a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

This prosecution, instituted under sec. 4475, Stats. 1898, was commenced on the 4th day of September, 1903, by complaint made to and filed with the district court for Milwaukee county, charging the plaintiff in error—who will be designated hereafter as the defendant—with the offense of bribery. The court issued the warrant upon this complaint, and defendant was apprehended and brought before the district court. Before any preliminary examination of defendant was held, an objection was interposed to any further proceedings in the case, and a motion was made for defendant's discharge from arrest upon the ground that no proper and sufficient complaint had been made in the case. The court overruled this objection and motion and proceeded with the preliminary examination. At the conclusion the court determined that an offense had been committed, and bound the defendant over for trial before the municipal court for Milwaukee county.

Thereafter an information was filed against defendant charging him with the offense of bribery, for which he had been held for trial. To this the defendant pleaded not guilty, without prejudice, and with leave to change his plea if he was so advised. Under this privilege defendant was given leave to withdraw his plea and file a plea in abatement of the action, alleging that no proper and legal preliminary examination had been held, for the reason that the judge of the district court had no jurisdiction of the person of the de-

fendant or of the subject matter of the alleged cause, and because no legal and sufficient complaint had been filed therein.

An affidavit of prejudice having been filed by defendant, alleging that the judge of the municipal court was prejudiced in the matter, an order was made changing the venue to the circuit court for Milwaukee county.

After a demurrer had been interposed to such plea in abatement, on May 11, 1904, the circuit court ruled that the merits of the plea should be considered, and thereupon overruled the plea. On the same day defendant demurred in writing to the information upon the ground that it appears upon its face that it stated no offense, in that the ordinance with reference to which it is alleged that defendant had accepted the bribe pertained to a transaction not within the power and jurisdiction of the common council of the city of Milwaukee, of which defendant was a member. The court overruled this demurrer, and on October 10, 1904, the case being called for trial, defendant moved the court to dismiss the information upon the grounds that defendant had appeared as a witness before the grand jury, which had been called for the December, 1901, term of the municipal court for Milwaukee county, and had given testimony before this grand jury with reference to the matter, transaction, and thing alleged in the information, and was therefore entitled to the immunity provided for under the provisions of sec. 4078, Stats. 1898, as amended by ch. 85, Laws of 1901. The court denied this motion upon the ground that the matters covered by the motion should be alleged by a special plea in bar. Thereupon defendant filed such plea setting out the matters of the motion, and upon his refusal to further plead the court ordered a plea of not guilty to be entered for him.

A jury having been duly impaneled, the cause proceeded to trial before the jury. The issue raised by the special plea

in bar was tried first. The defendant, to sustain his plea in bar, introduced evidence tending to show that a grand jury was called and attended upon the municipal court for the December, 1901, term, and that he was subpœnaed to appear before them, and that he did so appear on January 9, 1902; that the jury made a report to the municipal court; and that the clerk of this jury had taken minutes of the proceedings of the jury, as required by law, which minutes had been given to the district attorney for Milwaukee county. The district attorney was thereupon sworn as a witness, and asked to produce such minutes for the purpose of introducing them as evidence to show upon what transaction, matter, and thing this defendant gave testimony before the grand jury when he so appeared and testified before them. Upon objection by the state to such demand the court ruled that, upon the ground that all proceedings before the grand jury were privileged, except in so far as the statute permits them to be disclosed and received in evidence, the witness could not be compelled to produce the minutes for the purpose for which they were sought to be used, and that grand jurors and officers in attendance before them were incompetent as witnesses except to contradict or sustain a witness called upon the trial. No further testimony was offered on the special plea in bar, and the court directed the jury to find against the defendant on the plea interposed by him.

The trial upon the general issue of not guilty was then proceeded with. The state produced evidence to sustain the issue on its part. Defendant declined to cross-examine witnesses, and when the prosecution rested its case a motion was made for the discharge of the defendant because of fatal variance between the evidence adduced and the allegations of the information. This motion was denied. Defendant offered no evidence in the case and submitted no argument to the jury.

Before the case was submitted the following instructions,

which defendant requested to have given to the jury, were refused:

"(1) Under the testimony in this case the witnesses Oscar F. Davis and William I. Davis are what, in the law, is known as accomplices; that is, persons aiding or assisting in the commission of a crime. Although an accomplice is a competent witness, yet the jury ought not to convict the defendant upon the testimony of any accomplice or accomplices unless such testimony is corroborated in some material part.

"(2) You are instructed that unless the testimony of the witnesses Oscar F. Davis and William I. Davis is corroborated in some material matter tending directly to connect the defendant with the offense charged—that is, tending to corroborate the testimony of said witnesses that the defendant received the sum of eighty ($80) dollars, with the intent that defendant's official conduct should be influenced thereby—you ought not to convict the defendant, and your verdict should be not guilty.

"(3) You are instructed that unless there is credible testimony in this case in addition to, and in corroboration of, the testimony of the witnesses Oscar F. Davis and William I. Davis, which, taken in connection with their testimony, is sufficient to satisfy your minds beyond a reasonable doubt as to some material fact tending directly to prove that the defendant on the day in question corruptly received the sum of eighty ($80) dollars under an agreement and understanding that his official conduct should be influenced thereby, you should acquit the defendant.

"(4) The offense charged in the information consists of two elements, viz.: First, an agreement or understanding between the witnesses Oscar F. Davis and William I. Davis and the defendant that the defendant was to receive eighty ($80) dollars, with the intent and for the purpose of corruptly influencing him personally in his vote, action, and decision with reference to the ordinance in question; and, second, that the eighty dollars was paid and accepted in pursuance of such agreement and understanding.

"(5) You are instructed that if you find from the evidence that eighty ($80) dollars was paid to the defendant with the understanding or agreement that such money was to be used to influence the vote, action, and decision of other members

of the common council, and not to influence the defendant in his official action with reference to the ordinance in question, then you cannot convict the defendant under this information, and your verdict must be 'Not guilty.'

"(6) You are also instructed that, in order to find a verdict of guilty, you must be convinced beyond a reasonable doubt that the money was paid to the defendant and accepted by him for the purpose of influencing him in his own official action with reference to the ordinance in question.

"(7) If you find that the money was paid by the witness Oscar F. Davis and received by the defendant, this fact in itself is not sufficient to establish a corrupt agreement and understanding and a corrupt acceptance of said money for the purpose of influencing the official action of the defendant with reference to the ordinance in question.

"(8) In addition to the instructions already given as to the necessity of the testimony of an accomplice or accomplices being corroborated, you are further instructed that the testimony of the witness William I. Davis cannot and does not corroborate the testimony of the witness Oscar F. Davis; neither does the testimony of the witness Oscar F. Davis corroborate the testimony of the witness William I. Davis. One accomplice cannot corroborate the testimony of another accomplice."

The case was submitted to the jury under instructions from the court and upon the evidence received. The jury found defendant guilty as charged in the information. A motion for a new trial, made in due time, was denied, and judgment was awarded on the verdict of the jury, defendant being sentenced to imprisonment in the Milwaukee house of correction for the term of one year. He prosecutes this writ of error, directed to the circuit court for Milwaukee county, for a review of the proceedings in the case, and asks that the judgment be reversed upon the errors assigned in the record.

For the plaintiff in error there was a brief by *A. C. Umbreit* and *John M. Clarke,* attorneys, and *Hoyt, Doe, Umbreit & Olwell,* of counsel, and a supplemental brief by *J. M. Clarke,* attorney, and *Hoyt, Doe, Umbreit & Olwell,* of

counsel; and the cause was argued orally by *A. C. Umbreit* and *J. M. Clarke.* They contended, *inter alia,* that when the charge in a complaint is the commission of felony no jurisdiction is acquired by the court where the complaint is verified merely upon information and belief. *Comm. v. Certain Lottery Tickets,* 5 Cush. 369; *Comm. v. Phillips,* 16 Pick. 211, 213; *Blodgett v. Race,* 18 Hun, 132; *People ex rel. Kingsley v. Platt,* 22 Hun, 300; *In re Blum,* 30 N. Y. Supp. 396; *Blythe v. Tompkins,* 2 Abb. Pr. 468; *Brown v. Kelley,* 20 Mich. 27; *People ex rel. Hackett v. Judge,* 36 Mich. 334; *In re Way,* 41 Mich. 299; *People v. Heffron,* 53 Mich. 527; *People v. Schottey,* 66 Mich. 708; *Curnow v. Kessler,* 110 Mich. 10. The common council of a city has no power, right, or jurisdiction to grant to private individuals the right to use a highway, or any part thereof, for private purposes. *St. Vincent's F. O. Asylum v. Troy,* 76 N. Y. 108; *Callanan v. Gilman,* 107 N. Y. 360; *People ex rel. Wooster v. Maher,* 141 N. Y. 330; *Adams v. Ohio Falls C. Co.* 131 Ind. 375; *Glasgow v. St. Louis,* 87 Mo. 678; *State ex rel. St. Louis U. S. Co. v. Murphy,* 134 Mo. 548; *Reimer's Appeal,* 100 Pa. St. 182; *Smith v. McDowell,* 148 Ill. 51; *Field v. Barling,* 149 Ill. 556; *Hibbard, S. & B. Co. v. Chicago,* 173 Ill. 91; *Mikesell v. Durkee,* 34 Kan. 509; *Heath v. Des Moines & St. L. R. Co.* 61 Iowa, 11; *Gustafson v. Hamm,* 56 Minn. 334, 22 L. R. A. 565; *Glaessner v. Anheuser-Busch B. Asso.* 100 Mo. 508; *Tilly v. Mitchell & L. Co.* 121 Wis. 1, 98 N. W. 969. The council having no power, right, or jurisdiction to pass the ordinance in question, defendant, as a member of the council, could not be guilty of accepting a bribe to influence his official action with reference to such void ordinance. *State v. Butler,* 178 Mo. 272, 77 S. W. 574; *In re Yee Gee,* 83 Fed. 145; *U. S. v. Gibson,* 47 Fed. 833; *U. S. v. Boyer,* 85 Fed. 425; *James v. Bowman,* 190 U. S. 127; *Collins v. State,* 25 Tex. Supp. 202, 204; *Moore v. State,* 44 Tex. Crim. 159, 69 S. W. 521; *Gun-*

ning v. People, 189 Ill. 165; *Comm. v. Reese* (Ky.) 29 S. W. 352; *Kirby v. State,* 57 N. J. Law, 320, 31 Atl. 213; *Old v. Comm.* 18 Grat. 915; *Newman v. State,* 97 Ga. 367, 23 S. E. 831; *People ex rel. Purley v. Judge,* 2 Cal. 564. Proceedings before a grand jury can be disclosed upon a trial before a jury when such disclosure is in furtherance of justice, for the ascertainment of truth, and the protection of the rights of the accused. Under such circumstances grand jurors and prosecuting attorneys are competent witnesses and the minutes of the proceedings competent evidence. *Hinshaw v. State,* 147 Ind. 334; *Hunter v. Randall,* 69 Me. 183; *State v. Benner,* 64 Me. 267; *Sands v. Robison,* 12 Sm. & M. (Miss.) 704; *State v. Broughton,* 7 Ired. Law, 96; *State v. Moran,* 15 Oreg. 262; *Jones v. Turpin,* 6 Heisk. 181; *People v. Naughton,* 38 How. Pr. 430; *State v. Gardner,* 88 Minn. 130, 141, 92 N. W. 529, 534; *Comm. v. Mead,* 12 Gray, 167; *Comm. v. Green,* 126 Pa. St. 531; *Comm. v. McComb,* 157 Pa. St. 611; *Jenkins v. State,* 35 Fla. 737; *Izer v. State,* 77 Md. 110; *People v. Northey,* 77 Cal. 618; *U. S. v. Farrington,* 5 Fed. 343; *Comm. v. Hill,* 11 Cush. 137; *N. W. F. Ins. Co. v. Healey,* 151 Mass. 538; *State v. Will,* 97 Iowa, 58; 1 Bishop, Crim. Proc. (1st ed.) § 730; 4 Wigmore, Evidence, §§ 2360–2363; 3 Rice, Crim. Ev. § 255, p. 410, and cases cited; Wharton, Crim. Ev. (8th ed.) §§ 510, 512. A bribe giver is an accomplice of a bribe taker and the jury ought to be so instructed and at least cautioned as to the danger of convicting an alleged bribe taker upon the uncorroborated testimony of a bribe giver. 3 Rice, Crim. Ev. § 319; *U. S. v. Ybanez,* 53 Fed. 536, 540; *State v. Smalls,* 11 S. C. 262; *People v. Northey,* 77 Cal. 618; *State v. Carr,* 28 Oreg. 389; *People v. Bissert,* 71 App. Div. 118; *S. C.* affirmed, 172 N. Y. 643; *People v. Winant,* 24 Misc. (N. Y.) 361, 363; *State v. Ruffin,* 36 Tex. Crim. 565, 38 S. W. 169; *People v. Fielding,* 36 App. Div. 401; *Morawietz v. State* (Tex.) 80 S. W. 997; *Comm. v. Bos-*

worth, 22 Pick. 397; *Comm. v. Brooks,* 9 Gray, 299; *Comm. v. Price,* 10 Gray, 472; *Comm. v. Scott,* 123 Mass. 222; *Comm. v. Holmes,* 127 Mass. 424.

For the defendant in error there was a brief by the *Attorney General* and *Walter D. Corrigan,* first assistant attorney general, and *F. E. McGovern,* of counsel, and oral argument by *Mr. Corrigan.* They argued, among other things, that if an application for a special privilege is pending before a common council and within its jurisdiction to consider, even though the utmost that the common council can lawfully do would be to deny the application, a member of the common council who accepts money to influence his action on the question is within the bribery statute and may be convicted of that offense. *State v. Ellis,* 33 N. J. Law, 102, 97 Am. Dec. 707; *People v. McGardy* (Mich.) 99 N. W. 147; *Glover v. State,* 109 Ind. 391, 10 N. E. 282; *State v. McDonald,* 106 Ind. 233; *Shircliff v. State,* 96 Ind. 369; *State v. Potts,* 78 Iowa, 656; *State v. Gardner,* 54 Ohio St. 24, 42 N. E. 999, 31 L. R. A. 660; *State v. Butler,* 178 Mo. 272, 77 S. W. 560; 4 Am. & Eng. Ency. of Law (2d ed.) 908, and cases cited; *People v. Salsbury,* 134 Mich. 537, 96 N. W. 936. Where a statute expressly states in what cases a grand juror may disclose evidence which he has heard, he can do so in no other. *People v. Lauder,* 82 Mich. 109; *People v. Thompson,* 122 Mich. 411; Underhill, Crim. Ev. § 182; *People v. Tinder,* 19 Cal. 539, 81 Am. Dec. 77; *Tindle v. Nichols,* 20 Mo. 326; *Gutgesell v. State* (Tex.) 43 S. W. 1016; *Comm. v. Scowden,* 92 Ky. 120; *State v. Hayden,* 45 Iowa, 11; *State v. Gibbs,* 39 Iowa, 318; *State v. Ostrander,* 18 Iowa, 435; *People v. Hulbut,* 4 Denio, 133; *State v. McPherson,* 114 Iowa, 492, 87 N. W. 421; 9 Am. & Eng. Ency. of Law (1st ed.) 17, 18. To the contrary: *Jenkins v. State,* 35 Fla. 737; *Hinshaw v. State,* 147 Ind. 334; *Thrawley v. State,* 153 Ind. 375; 1 Greenl. Ev. (16th ed.) § 252. See *Crocker v. State,* Meigs (Tenn.) 127; *Beam v. Link,* 27 Mo. 261; *State v. Fas-*

set, 16 Conn. 457; *U. S. v. Cobban,* 127 Fed. 713; *State v. Logan,* 1 Nev. 509, and cases cited; *State v. Lewis,* 38 La. Ann. 680; *McLellan v. Richardson,* 13 Me. 82; *Gitchell v. People,* 146 Ill. 175; *State v. Hamlin,* 47 Conn. 114, and cases cited; *Hall v. State,* 134 Ala. 90, 32 So. 750; *People v. Diamond,* 76 N. Y. Supp. 57; *Pritchett v. Frisby,* 112 Ky. 629, 66 S. W. 503; *Hines v. State* (Tex.) 39 S. W. 935; *Loveland v. Cooley,* 59 Minn. 259; *State v. Brewster,* 70 Vt. 341. A bribe giver is not an accomplice of a bribe taker. *State v. Durnam,* 73 Minn. 150, 75 N. W. 1127; *Comm. v. Wood,* 11 Gray, 85; *Reg. v. Boyes,* 1 Best & S. 311; *State ex rel. Thurston v. Sargent,* 71 Minn. 28, 73 N. W. 626; Wharton, Crim. Ev. (9th ed.) § 440; *State v. Roberts,* 15 Oreg. 187; 1 Bishop, New Crim. Proc. § 1159; *State v. Renswick,* 85 Minn. 19, 88 N. W. 22. That the instructions as to testimony of accomplices were properly refused, see *Black v. State,* 59 Wis. 471; *Porath v. State,* 90 Wis. 527.

SIEBECKER, J. The plea in abatement, alleging that the court had no jurisdiction of the person or of the subject matter of the transaction, is based upon the ground that no sufficient and valid complaint had been filed before the defendant was arrested and the preliminary examination was held. The complaint states facts which, in effect, set forth the necessary elements constituting the alleged offense. The complainant in form deposes and states that he, "being first duly sworn, on oath complains to the district court of the county of Milwaukee, and states *that he has good reason to believe and does believe*" that the defendant, while acting in his official capacity as an alderman of the city of Milwaukee, did corruptly receive money to influence him in his official action, vote, and judgment in respect to matters then pending wherein he was by law required to act. The contention is that a complaint upon information and belief does not

meet the requirement of sec. 4776, Stats. 1898, which provides that: "Upon complaint being made to any magistrate that a criminal offense has been committed, he shall examine, on oath, the complainant and any witnesses produced by him, and shall reduce the complaint to writing and shall cause the same to be subscribed by the complainant; and if it shall appear that any such offense has been committed the magistrate shall issue a warrant reciting the substance of the accusation," for the apprehension of the accused, and thereupon require an officer to execute it. This section and sec. 4740, Stats. 1898, contain the provisions for making complaints and the issuance of warrants for the apprehension of offenders. These two sections, in so far as they bear on the inquiry before us, are alike, and any construction which has been given by this court to the terms of either of these statutes will be pertinent and material in passing on the question raised by the plea in abatement.

In *State ex rel. Long v. Keyes,* 75 Wis. 288, 44 N. W. 13, it is declared that sec. 4776, adopted as early as 1839, was taken from the statutes of New York as it had there stood for some time. The claim that a good and sufficient complaint under this statute must state in positive and direct terms that the offense charged has been committed was fully considered and determined in the case of *State v. Davie,* 62 Wis. 305, 22 N. W. 411. True, that was a complaint charging a simple misdemeanor, upon which the accused was tried, convicted, and sentenced; but, as above indicated, the requirements of the statute now before us and the one before the court in that case are alike in providing what proceedings shall be had in making complaint for the apprehension of offenders. In that case, as in this, the constitutional provisions which prohibit persons from being held to answer for criminal offenses without due process of law were appealed to. Upon a full consideration of this question, then presented, and in view of the adjudications in other jurisdictions seemingly in conflict

on the subject, it was determined that under our statutes a formal complaint which states that the complainant was "informed and has good reason to believe and does verily believe" that the offense described had been committed (naming the offender) meets the particularity and certainty required in charging the offense by the terms of this statute. It is pointed out that the statute requires that an oral complaint be first made to the magistrate, and he thereupon is required to put the person complaining and the other witnesses produced by him under oath; and the complaint shall then be reduced to writing, but need not have a written verification on oath appended to it, but it must be based on the sworn oral statements of the complainant and witnesses, if any are produced, made to the magistrate on examination by him. If, after such proceeding, the magistrate is satisfied that an offense has been committed and that the person accused is the probable offender, he is authorized to issue a warrant reciting the substance of the complaint and directing his apprehension. Under the proceeding thus provided it was held that the statute did not contemplate that the formal written complaint could be made in positive terms only, but that a formal complaint on information and belief is sufficient. It is supposed that the facts disclosed to the magistrate upon his examination on oath of the complainant and the witnesses, if any, satisfies him that an offense has been committed and that a warrant should issue for the apprehension of the person charged. This practice was upheld in the case of *State v. Hobbs,* 39 Me. 212, which was expressly approved in the *Davie Case.* This construction of the statute fulfils the constitutional requirements of due process of law, in that the proceeding results in an adjudication by the magistrate that good grounds are shown for the apprehension of the accused. *State v. Bielby,* 21 Wis. 204.

Counsel concede that the practice of trying persons upon complaint on information and belief in misdemeanor cases is

sanctioned and approved, but assert that such practice is unauthorized in the case of felonies. The grounds for such a distinction are not apparent because of any difference in effect on the legal rights of persons involved in the two proceedings, for each subjects the party to an accusation, arrest, and inquisition as to whether or not he is guilty as charged. If any difference in strictness of procedure should be indulged, then less particularity and certainty should be required in proceedings for the arrest for a preliminary examination before an inferior tribunal to determine whether a party should be held for trial than in cases where persons are arrested and tried upon complaint which may result in conviction and sentence. *Comm. v. Phillips,* 16 Pick. 211. For other cases on the subject, see *State v. Dale,* 3 Wis. 795; *State v. Bielby, supra; State ex rel. De Puy v. Evans,* 88 Wis. 255, 60 N. W. 433.

This construction of the statute, we believe, has been followed since its adoption, and has the sanction of long years of acquiescence in the trial courts, and has not been questioned in this court except in the instances above mentioned. We must hold that the complaint is sufficient under sec. 4475, and that the plea in abatement was properly overruled.

2. The information charges that the defendant, pursuant to an understanding and agreement with one Oscar F. Davis, corruptly received money to influence him in the casting of his vote as a member of the common council of the city of Milwaukee for the passage of an ordinance pending before the common council, whereby it was sought to grant to the Davis Bros. Manufacturing Company the right to lay a railroad track along and across a public street of the city. The charge is alleged with sufficient particularity to meet the requirements of sec. 4475, Stats. 1898. The defendant demurred to the information upon the ground that it appeared upon the face thereof that the ordinance described therein could not, by law, be then pending, nor be brought before

the common council for action or for a vote, because the ordinance was void, in that it was thereby attempted to grant to the Davis Bros. Manufacturing Company a right and privilege which the common council had no power or authority to grant, and in that any action thereon by the common council would be wholly void and of no effect. It is contended that the privilege or license which the common council attempted to grant by this ordinance is void, because it attempts to grant the manufacturing company the use of a public street for private purposes. It may be assumed that the privilege attempted to be given by this ordinance was a private one, and that the use of the street authorized by the ordinance was one which the common council had no right to grant to individuals. The question then arises, Do the facts alleged in the information constitute an offense under sec. 4475, Stats. 1898? This section provides that:

"Any person who shall corruptly give, offer or promise to any . . . legislative . . . officer of . . . [a] city . . . any gift or gratuity, or any money, goods, thing in action, personal or real property, or anything of value, . . . with intent to influence his vote, opinion, judgment or action *upon any question, matter, cause or proceeding* which may then be pending, or which may by law come or be brought before him *in his official capacity,* and any such officer who shall corruptly accept or receive any such gift, [etc.] under any agreement or understanding that his vote, opinion, judgment or action should be thereby so influenced shall be punished" as prescribed.

The language of the statute makes it plain that the acts charged as criminal must arise out of a transaction which pertains to a question, matter, cause, or proceeding which is pending, or which may by law come or be brought, before such officer in his official capacity. It is claimed that since the ordinance attempted to bestow on the members of the company a privilege which in law it had no right to grant, it must be held that the act of voting on the passage or re-

jection of the ordinance was wholly beyond and outside of the official power and duty of the defendant as a member of the common council, and therefore bribery cannot be predicated on his action in relation thereto. It is without dispute that the common council is given the right to control, regulate, and repair the streets of the city, to regulate the manner of using the streets and pavements, and to protect them from injury. This power not only authorizes the council to regulate the public use of the streets, but imposes upon it the duty of preventing unlawful uses of them, and to do this the members of the common council are empowered to prescribe by ordinance what are deemed proper and what are improper uses of the streets. Whenever they pass their opinion or judgment or when they take action upon such questions they are in the exercise of powers and duties pertaining to their official capacity. Whether the act of voting on this ordinance by a member of the common council was an act relating to his official capacity cannot be tested by the validity or invalidity of the privilege sought to be granted, but depends upon the question of whether or not the ordinance was one which dealt with a subject over which the common council had jurisdiction, and upon which the members of the common council had a right to vote. The subject of the ordinance clearly related to the proper regulation of the street in question. It was an application to the council for a certain use of a street, concerning which the common council had power to act, and the members were called upon to ascertain and determine whether or not the use which was sought to be sanctioned and authorized by this ordinance was a proper one, and in passing on this question it was the right and duty of the members of the common council to vote when the ordinance came before them for passage and adoption. If the ordinance attempted to grant an unlawful use, then it was the duty of the members of the common council to vote against its adoption. In view of the right they had and the duty imposed

upon them, the question is not whether or not the ordinance granted a valid privilege, but whether the members of the common council had the right to vote on the question of its passage and adoption. In view of the powers and duties imposed upon them by the city charter, it is clear that under the powers given them to control and regulate the manner of using the public streets they had the right to deal with the subject matter of the ordinance. The power, therefore, embraces the right and imposes the duty on members of the common council of refusing to sanction an improper and illegal use of such streets under cover of authority from them. The voting on such an ordinance is action by members of the common council within their official capacity, and if a member receives money from any person under an understanding or agreement that his vote, judgment, or action should be influenced thereby, then he offends against the terms of the statute.

We are cited to the cases of *James v. Bowman,* 190 U. S. 127, 23 Sup. Ct. 678; *U. S. v. Boyer,* 85 Fed. 425; *Collins v. State,* 25 Tex. Supp. 202; and *State v. Butler,* 178 Mo. 272, 77 S. W. 560, among others, as sustaining the position that bribery cannot be predicated upon the action of the defendant in voting on the ordinance in question because the privilege sought to be bestowed is invalid. An examination of these decisions shows that they do not support the contention, but that, in so far as they deal with the subject in hand, they support the conclusion above stated. In those instances wherein it was ruled that no offense had been shown, it was upon the ground that the act charged as corrupt official conduct pertained to some matter over which the law neither expressly nor by implication granted the officers involved any authority. Such cases differ from the instant case, which presents one wherein the accused is charged with having received money corruptly to influence him in his vote and action upon a matter and proceeding over which the common council

had been given jurisdiction and power, under which a matter was legally pending before him in his official capacity. These circumstances furnish a proper basis on which to found the charge of bribery. This conclusion is sustained by numerous cases, of which we cite the following: *State v. Ellis,* 33 N. J. Law, 102; *People v. McGarry* (Mich.) 99 N. W. 147; *Glover v. State,* 109 Ind. 391, 10 N. E. 282; *People v. Salsbury,* 134 Mich. 537, 96 N. W. 936; and *State v. Potts,* 78 Iowa, 656, 43 N. W. 534.

3. Error is assigned upon the ruling of the trial court to the effect that the proceedings before a grand jury are privileged from being adduced before it as evidence by the defendant for the purpose of showing his immunity under sec. 4078, Stats. 1898, as amended by ch. 85, Laws of 1901. The amended section provides that no witness or party in the actions, proceedings, or examinations therein specified

"shall be excused from testifying on the ground that his testimony may expose him to prosecution for any crime, misdemeanor or forfeiture. But no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, in such action, proceeding or examination, except a prosecution for perjury committed in giving such testimony."

It is not questioned but that this statute gives the defendant an important right, in that he may assert a statutory exemption from punishment by way of defense in a criminal prosecution. An act of Congress of like import was held valid legislation, and it was decided that under its terms witnesses and parties could be compelled to give testimony of a self-incriminating character, if the provisions of the statute afforded immunity from prosecution for the offense to which the testimony related. *Brown v. Walker,* 161 U. S. 591, 16 Sup. Ct. 644. The defendant interposed a plea in bar claiming immunity from punishment for the offense charged

in the information upon the ground that he appeared before the grand jury of Milwaukee county while it was in session in the month of January, 1902, and gave testimony as to the transaction, matter, and things alleged in the information. Upon the trial of the special issue raised by this plea he attempted to compel the production of the minutes of the proceedings of the grand jury for the purpose of offering them as original evidence to sustain the allegations of his plea in bar, but the court ruled these minutes as well as the testimony of members of the grand jury and the district attorney to be privileged under the rule of secrecy applied to proceedings before a grand jury. The purpose of such secrecy is embodied in the terms of their oath of office, and was designed to further an efficient and effective administration of the criminal law. The authorities as to whether testimony of the proceedings before a grand jury is competent as original evidence upon a trial in court are not uniform. They unite in declaring that it can at no time be shown how the individual jurors voted, or what was said by them during their deliberations, for the reason that a disclosure thereof could not serve any purpose of justice. In *Comm. v. Mead,* 12 Gray, 167, the court, speaking on this subject, through Justice BIGELOW declares:

"The reasons on which the sanction of secrecy which the common law gives to proceedings before grand juries is founded are said in the books to be three-fold: One is that the utmost freedom of disclosure of alleged crimes and offenses by prosecutors may be secured. A second is that perjury and subornation of perjury may be prevented by withholding the knowledge of facts testified to before the grand jury, which, if known, it would be for the interest of the accused or their confederates to attempt to disprove by procuring false testimony. The third is to conceal the fact that an indictment is found against a party in order to avoid the danger that he may escape and elude arrest upon it before the presentment is made."

All of the reasons practically disappear after the arrest of the accused, when he is put upon his trial in court. The only one of these grounds which could possibly, in a measure, subsist is the danger of subornation, and this is quite effectually disregarded in modern criminal law, which approves the right and the procedure by which the accused, in fairness, is informed before trial of the witnesses the state relies upon to establish the case. An examination of the adjudications leads us to the conclusion that evidence by grand jurors of the statements made before them by witnesses and parties is competent upon trials in courts, and that the weight of authority sustains the practice whenever the trial court deems it necessary for the ascertainment of truth and in furtherance of justice. Of the leading authorities on this subject we cite the following: *State v. Benner,* 64 Me. 267; *Izer v. State,* 77 Md. 110, 26 Atl. 282; *Comm. v. Mead,* 12 Gray, 167; *Comm. v. Hill,* 11 Cush. 137; *People v. Naughton,* 38 How. Pr. 430; 4 Wigmore, Evidence, §§ 2360–2363; 3 Rice, Evidence, 412.

It is urged that the rule of the common law as to the competency of this class of evidence cannot control, because the subject is regulated by statute, which excludes it except as therein made competent. The statutory provisions on the subject are embodied in secs. 2553–2555. An examination of these sections shows that, when the court so orders, grand jurors and officers attending on them are forbidden to make disclosure of the fact that an indictment for felony has been found until the arrest of the offender; that the jurors are not allowed to state or testify in what manner they may have voted, or what opinion was expressed by any of them, on any question before them; and that the members of the jury may be required to testify as to whether the testimony of a witness examined before them is consistent with or differs from his evidence before a court; and in prosecutions for perjury of the person who appeared and testified before them they may

be required to disclose the testimony given before them. It will be observed that the statutes are declaratory in part of the rules which had been established by the courts as to the competency of such evidence in the administration of the criminal law, but they in no way indicate that it was thereby intended to interfere with the established practice, which was to the effect that it is proper to examine a grand juror upon a trial in court as to what a witness testified to before the grand jury, when not objectionable under the ordinary rules of evidence, and when the ends of justice require it. The supreme court of the state of Florida, in construing their statute on this subject, which is the same in terms and phraseology as the sections above mentioned, held that they in no way abrogated the common-law rules which prevailed when the statute was adopted. See *Jenkins v. State,* 35 Fla. 737, 18 South. 182, and cases cited; *Hinshaw v. State,* 147 Ind. 334, 47 N. E. 157. Upon these grounds we must hold that the court erred in holding that the evidence of grand jurors, the district attorney, and the minutes of the grand jury's proceedings could not be received as original testimony, when it is material to the issues involved upon this trial.

But an additional and very strong and cogent reason for holding this evidence material and competent is found in applying the provisions of ch. 85, Laws of 1901, quoted above. As stated, this statute takes from the defendant a very important right, in that he may be compelled to give testimony before the grand jury, and for the deprivation of this constitutional privilege has granted him complete immunity from prosecution or subjection to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he testified or produced evidence. If the defendant can establish that he is entitled to such immunity, it will be a complete defense to any further proceeding and entitle him to a discharge from further prosecution. In its legal aspect this right is as important to the defendant as any

legal defense to the accusation. No grounds are suggested why he should not be awarded the usual and ordinary methods recognized by the law for showing the facts necessary to establish this defense, nor do any valid reasons suggest themselves to us for holding that he should be deprived of this right given him in the law. We are of the opinion that this evidence, if otherwise unobjectionable, is competent as original evidence on the question involved in the issue raised by defendant's plea in bar, and should have been received, regardless of whether or not defendant testified as a witness upon the trial. It is the policy of the state not to compel persons charged with crimes to testify in their own behalf. This privilege should not be imperiled by denying them the right to employ any legal means to establish their defenses.

4. It is contended that the court erred in directing a verdict against defendant on the special issue raised by this plea in bar. The evidence before the court upon this issue seems to permit of no inferences tending to sustain defendant's plea. Under these circumstances the court was warranted in instructing the jury that there was no proof before them which could support defendant's plea, and that they must so find upon the special issue.

5. It is further alleged that there was a fatal variance between the evidence and the allegations of the information, and that the court improperly refused to give the instructions requested on this point. We deem it sufficient to state as to this assignment of error that we do not find a fatal variance between the proof and the charge. The facts in evidence were such that a jury might reasonably infer that defendant was the recipient of a part of the money paid by Oscar F. Davis, and that he received it under an understanding that it was received for the purpose of influencing his vote or action in reference to the ordinance in question. *State v. Dunn,* 125 Wis. 181, 102 N. W. 935. Defendant's requests for instructions to the jury on this branch of the case do not

require separate attention, because the charge of the court sufficiently and properly covers the points embraced in them and correctly informs the jury of the rules of law applicable thereto.

The defendant submitted several instructions requesting the court, in effect, to inform the jury that they would not be warranted in law in convicting the defendant, because the evidence relied on to establish guilt is the uncorroborated evidence of accomplices in crime. In the case of *Black v. State,* 59 Wis. 471, 18 N. W. 457, this court held that: "When there is no evidence against the accused, except the uncorroborated testimony of an accomplice, it is discretionary with the trial court whether to direct an acquittal or not;" and that "a judgment will not be reversed for refusing to set aside a verdict founded upon such testimony alone." The rule thus adopted was approved in *State v. Juneau,* 88 Wis. 180, 59 N. W. 580, and in *Porath v. State,* 90 Wis. 527, 63 N. W. 1061. In the latter case, speaking on this subject, it is said:

"It was discretionary with the trial court whether to direct an acquittal or not, and a judgment founded on such uncorroborated testimony alone will not be reversed. The trial court was not required to direct an acquittal on that ground, or to give any instruction to the jury as to the effect of the testimony of the prosecutrix" (if she be regarded as an accomplice).

This ruling is supported by the established practice, upon the principle that the trial court acts within the field of its discretion as to whether a verdict of acquittal should be directed, or admonitory instructions cautioning them against finding a verdict of guilty upon such testimony only should be given to the jury. An examination of the evidence in this case shows clearly that the court did not abuse its discretion in refusing to give the requested instructions, in that the testimony is amply sufficient to sustain the verdict; but the

judgment of the court cannot stand on account of the error in excluding proof of the proceedings before the grand jury.

By the Court.—The judgment is reversed, and the cause is remanded for a new trial. The inspector of the Milwaukee house of correction will deliver the plaintiff in error to the sheriff of Milwaukee county, who is directed to keep the said *Murphy* in his custody until he is duly discharged therefrom, or until otherwise ordered according to law.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Appellant, vs. HOST, Commissioner of Insurance, Respondent.

December 19, 1904—May 2, 1905.

Life insurance: Distribution of surplus: Periods: Statutes construed: "May" and "shall:" Revocation of license: Judgment: Validity of policies.

1. Under secs. 87 and 83 of the insurance laws of New York (ch. 118, Gen. Laws N. Y. 1868, and ch. 100, Gen. Laws N. Y. 1872) an insurance corporation of that state has authority to issue deferred-dividend policies by the terms of which accumulated surplus is not to be distributed except in periods longer than five years.
2. Sec. 1952, Stats. 1898 (providing that mutual life insurance corporations *may* distribute their surplus annually, or once in two, three, four, or five years as the directors may determine, and that in determining the amount of surplus to be distributed there *shall* be reserved an amount not less than the aggregate net value of all the outstanding policies, etc.), does not require the distribution to be made at least once in every five years. That the word "may" was intended to be permissive only is shown by the use of the mandatory word "shall" in the same section with reference to the amount to be reserved, and also by the history of the section and by the practical construction given to it by all parties concerned for more than thirty years after its enactment as sec. 14, ch. 59, Laws of 1870.

3. **Where the words "may" and "shall" both occur in the same statute, it is presumed that they were used advisedly by the legislature and that each was intended to be given its distinctive meaning.**
4. **In an action to restrain the commissioner of insurance from revoking the license of a life insurance company, it should not be adjudged that policies issued by the company were unlawful, where the holders of such policies are not in any way parties to the action.**

APPEAL from a judgment of the circuit court for Dane county: B. F. DUNWIDDIE, Judge. *Reversed.*

This is an action to restrain the commissioner of insurance from revoking the license issued to the plaintiff to do business in this state. The facts are mostly undisputed. The complaint alleges, in effect, that the plaintiff was incorporated in 1859 under the Laws of New York of 1853, and the amendments thereto, for the incorporation of life and health insurance companies; that by sec. 87 of the general insurance laws of the state of New York, first enacted as ch. 118 of the General Laws of New York for the year 1868, it is provided that:

"Any domestic life insurance corporation which by its charter or articles of association is restricted to making a dividend only once in two or more years may hereafter, notwithstanding anything to the contrary in such charter or articles, make and pay over dividends annually, *or at longer intervals,* in the manner and proportions and among the parties provided for in such charter or articles."

That by sec. 83 of the general insurance laws of the state of New York, first enacted as ch. 100 of the General Laws of 1872, it was provided that:

"Any domestic life insurance corporation may ascertain at any given time, and from time to time, the proportion of surplus accruing to each policy from the date of the last to the date of the next succeeding premium payment, and may distribute the proportion found to be equitable, either in cash, in reduction of premium or in reversionary insurance,

payable with the policy, and upon the same conditions as therein expressed at the next succeeding date of such payment, notwithstanding anything in the charter of such corporation to the contrary."

And the complaint further alleges that all of its policies issued by it since its organization and now outstanding were executed in the state of New York, and are payable at the home office of the plaintiff in the state of New York.

The complaint further alleges, in effect, that for several years prior to the commencement of this action the plaintiff had done business in this state under licenses issued by the several commissioners of insurance; that December 12, 1902, one L. A. Brunckhorst, as a citizen and resident of this state, presented to the commissioner of insurance a petition or complaint wherein he alleged, in effect, that the plaintiff was a foreign life insurance company doing business in this state on the mutual plan, being duly licensed by the insurance department; and further alleged that the plaintiff "is now violating, and has for many years knowingly and wilfully violated, the insurance statute" of this state known as sec. 1952 and the acts amendatory thereof, "to the great damage, loss, and detriment of the people of the state of Wisconsin, in that said company has failed to comply with the provisions of said sec. 1952 . . . in failing to make distribution of the surplus funds of said company among the policy-holders of said company as provided in and by said section; . . . that by reason of such violation thousands of citizens of the state of Wisconsin have been deprived of moneys justly due them by forfeitures imposed by" the plaintiff, "and are now and continue to be deprived of money justly due them from said company;" and prayed that the plaintiff be summoned to appear before the insurance commissioner to show cause why its license should not be revoked in accordance with sec. 1955 of the Statutes of 1898 and acts amendatory thereof. The complaint alleges that pending the hearing of that peti-

tion, and on March 1, 1903, the commissioner issued a license to the plaintiff for one year, similar to such former licenses held by the plaintiff; that a hearing was had upon such petition June 16, 1903, and the defendant, as such commissioner, made his decision thereon July 31, 1903, wherein, among other things, he decided as follows: "I further decide that" the plaintiff "has violated said sec. 1952, as charged" by the complainant, L. A. Brunckhorst, "by not complying with the provisions of said section. Therefore I hereby notify the *Equitable Life Assurance Society of the United States* that if a statement, signed by the proper officers of the company, that there will be a compliance with sec. 1952, *as herein decided,* be not filed with this department within the period of thirty days from the date hereof, the license of the company to transact business in this state will be revoked at the expiration of that time."

The complaint herein further alleges, in effect, that the defendant, acting or assuming to act as such commissioner, "threatens to and will at the expiration of thirty days from July 31, 1903, revoke the license of this plaintiff to transact business in Wisconsin, unless within that period this plaintiff file with said defendant a statement in writing that it will comply with sec. 1952 as construed by said defendant (which construction said plaintiff alleges was and is erroneous), and threatens to and will thereafter revoke the license of the plaintiff to transact business in Wisconsin *unless* this plaintiff *distribute among its policy-holders,* regardless of the terms of their policies, the amount so erroneously found by the said defendant to be a surplus as aforesaid, in accordance with his said construction of said statute, and unless the plaintiff shall otherwise comply with said statute as so erroneously construed by the defendant."

The defendant's answer to the complaint herein admits that the plaintiff is, and for more than forty years past has been, a corporation organized and existing under the laws of the state of New York, engaged in the business of life insur-

ance on the mutual plan, and that for many years past it had been duly licensed under the laws of the state of Wisconsin to transact such business within this state; that the plaintiff was incorporated in 1859 under the general act of the legislature of the state of New York passed June 24, 1853; that ch. 118 of the General Laws of New York for the year 1868, sec. 87, was duly enacted and became and was and is the law of the state of New York, as set forth in the complaint; that ch. 100 of the General Laws of 1872, sec. 83, of the state of New York, was enacted, became, was, and is the law of the state of New York, as alleged in the complaint; that the policies issued by the plaintiff since its organization and now outstanding were all executed in the state of New York and are payable at the home office of the plaintiff in said state. The answer further alleges, among other things, in effect, that the surplus funds which this defendant determined to be in possession of the plaintiff subject to distribution under sec. 1952, and which, under the defendant's decision, *must be distributed among the policy-holders* of the plaintiff annually or once in every two, three, four, or five years, pursuant to sec. 1952, was composed in large part of earnings and accumulations derived from payments made by policy-holders of the plaintiff under such deferred-dividend policies; that the total amount of outstanding insurance of the plaintiff at the date of the decision of the commissioner was in excess of $1,300,000,000; that the total value of its assets at said time and now does not exceed $400,000,000; that during the last ten years the plaintiff has paid in dividends $28,847,371.31; that such amount was paid as alleged and shown in the complaint; that the petitioner was not a policy-holder of the plaintiff; that the defendant, acting as such commissioner, "had he not been enjoined by the writ issued in this action, would have revoked the license of the plaintiff to transact business in Wisconsin within thirty days after July 31, 1903, if the plaintiff had not within such time filed

a statement in writing that it would comply with sec. 1952 *as construed by this defendant;* and that this defendant *intends,* unless restrained by the order of this court, *to revoke the license* of the plaintiff to transact business in Wisconsin, unless plaintiff complies with the provisions of sec. 1952, *and distributes* among its policy-holders at least once in five years the surplus earnings which have been shown to be in the plaintiff's possession; that the plaintiff has many thousands of policy-holders within the state of Wisconsin;" that March 1, 1903, the defendant issued to the plaintiff a license to do business in Wisconsin for the ensuing year because the plaintiff had otherwise complied with the requirements of the laws of this state, and this defendant was under restraint, as mentioned; that the insurance contracts of the plaintiff issued to Wisconsin citizens now in force on December 31, 1902, amounted to $14,014,692, the annual premiums being paid thereon amounting to $428,100; that more than eighty-four per cent. of the insurance contracts and policies aforesaid now in force issued to and held by Wisconsin citizens and policy-holders are upon what is known as the ten, fifteen, and twenty year deferred-dividend plan, by which no dividends are to be paid or apportioned to, nor is any surplus divided between or among, such policies and insurance contracts until the end of the deferred-dividend period, and not then if a forfeiture is imposed upon death or the failure to pay premiums.

The issues thus joined were tried by the court, and at the close of the trial the court made findings of fact and conclusions of law, and, among other things, found, in effect: (4) That the defendant, on July 31, 1903, in a proceeding theretofore commenced and heard before him as such commissioner for the revocation of the license of the plaintiff upon the ground that the plaintiff was issuing a form of life insurance policy containing provisions contrary to the requirements of sec. 1952 of the Statutes, as such "commissioner

made a ruling in which he held that said plaintiff was issuing such policies in violation of the requirements of said section, and giving said plaintiff notice that, unless within thirty days from the date of said ruling it filed in said insurance department a statement that it would comply with said section *as interpreted by him in said ruling,* he would revoke said plaintiff's license to do business in this state." (5) That the plaintiff did not comply with said ruling and is not complying therewith, but, on the contrary, has commenced this action to restrain the commissioner from enforcing his ruling. (12) That the plaintiff has assets in the total amount of $381,226,035.53, of which $73,354,138.03 is a surplus over and above the amount of the legal reserve and the amount required by the company for the purpose of discharging all its liabilities as they may occur in the future; that the amount of such legal reserve, together with the premiums becoming due and payable upon present contracts issued, are sufficient to discharge all obligations of the plaintiff association as they mature; that the plaintiff has not made distribution of such surplus according to sec. 1952, "but has for many years violated, and does now violate, the provisions of said section by failing, neglecting, and *refusing to distribute or apportion* at least every five years the surplus profits and earnings of the plaintiff company among its policy-holders, residents of the state of Wisconsin, holding and representing policies and contracts to the amount of *twelve million dollars and upwards.*"

And as conclusions of law the court held, in effect: (1) That the issue of deferred-dividend policies by which the distribution of dividends is deferred beyond a period of five years to the citizens of this state is contrary to the first provision of sec. 1952, *and is unlawful;* (2) that unless the plaintiff signifies its consent to discontinue the issue in this state of deferred-dividend policies, the commissioner of insurance "may and should, under the requirements of secs.

1955, 1972*a*, and 1978 of the Statutes of 1898, revoke the plaintiff's license to do business in this state;" (3) that there has been no practical construction of sec. 1952 as permitting the issue in this state of said form of policy now binding upon the court; (4) that the defendant is entitled to judgment dissolving said preliminary injunction, dismissing this action, and for his taxable costs and disbursements; and ordered judgment to be entered accordingly. From the judgment so entered the plaintiff appeals.

For the appellant there were briefs by *Winkler, Flanders, Smith, Bottum & Vilas,* attorneys, and *Bainbridge Colby* and *Charles F. Fawsett,* of counsel, and oral argument by *F. C. Winkler, J. G. Flanders, C. F. Fawsett, Bainbridge Colby,* and *D. T. Watson.*

The *Attorney General* and *Julius E. Roehr,* of counsel, for the respondent.

The following opinion was filed February 21, 1905:

CASSODAY, C. J. The facts in this case are practically undisputed and largely stipulated. The plaintiff was incorporated in 1859, under the laws of New York then in force, as a domestic life insurance corporation. It continued to do such business under such laws and the several amendments thereto from that time down to the controversy in question, which arose about two years ago, and has also continued such business since. For more than thirty years prior to the controversy in question the plaintiff had been doing such insurance business in this state, and issuing to the citizens thereof "deferred-dividend insurance," wherein the accumulated assets or surplus was not to be distributed except in longer periods than five years. Each of such policies was executed in the state of New York and payable at the home office of the plaintiff in that state. Eleven other life insurance companies, named, each and all doing business in Wisconsin during the time mentioned, had adopted and issued similar

policies as to the periods for the distribution of such accumulated assets or surplus. The plaintiff alone has issued and has outstanding in the United States at least $1,000,000,000 in such form of insurance, of which at least $12,000,000 was so issued and is outstanding in Wisconsin. It is conceded that during each and every year of the thirty mentioned the commissioners of insurance of this state issued to the plaintiff a license to transact the business of life insurance in this state, reciting in each such license that the plaintiff had "complied with the laws of this state relative to life insurance companies," and that until the controversy in question "no formal or official objection of any kind was ever brought to the attention of the plaintiff by any insurance commissioner of the state of Wisconsin, or by any other official of said state;" and that during that period neither the right of the plaintiff nor any other company to transact such form of business was ever "challenged by or on behalf of the state of Wisconsin." The controversy in question was not instituted by any policy-holder of the plaintiff, but by an individual solely as "a citizen and resident" of this state. The substance of the complaint of such "citizen and resident" upon which the revocation of the license so issued to the plaintiff was prayed, and the hearing and decision of the commissioner thereon, are set forth in the foregoing statement. That decision of the commissioner, so made July 31, 1903, held that the issuing of such policies by the plaintiff was in violation of the statutes of this state, and that, unless the plaintiff filed a statement in his office within thirty days from the date thereof that it would comply with the statutes as interpreted by the commissioner, he would revoke the plaintiff's license to do business in this state. Before the expiration of the thirty days so fixed by the commissioner this action was commenced to restrain him from revoking the plaintiff's license, as mentioned in the statement of facts. The substance of the complaint and answer, and the findings of fact

and conclusions of law made by the trial court, and the judgment dismissing the action are sufficiently set forth in the foregoing statement.

It is claimed that the decision of the commissioner of insurance, as affirmed by the trial court, should be sustained upon either of two grounds: (1) The first ground upon which it is so claimed naturally calling for consideration is that the plaintiff is not authorized by the laws of New York to issue such "deferred-dividend insurance," wherein, by the terms of the contract, the accumulated assets or surplus was only to be distributed in longer periods than five years—usually ten, fifteen, or twenty years. True, as stated by the commissioner and found by the trial court, the provisions of the original charter of the plaintiff, issued under the laws of New York in 1859, declared, in effect, that the insurance business of the company should be "conducted upon the mutual plan;" that "within sixty days from the expiration of the first five years, . . . and within the first sixty days of every subsequent period of five years," the officers of the company should "cause a balance to be struck of the affairs of the company, which" should "exhibit its assets and liabilities," and also its "net surplus, after deducting a sufficient amount to cover all outstanding risks, and other obligations;" and that each policy-holder should "be credited with an equitable share of the said surplus;" and that "such equitable share" should "be applied to the purchase of an additional amount of insurance," or "to the purchase of an annuity," as therein provided. The trial court also found, in effect, that prior to 1868 the plaintiff, pursuant to such charter provisions and to law, did so distribute among all its dividend participating policy-holders its surplus funds; that in 1868 the plaintiff devised a form of policy, now known as "deferred-dividend policies," as already mentioned; that the plaintiff began the issue in Wisconsin of such deferred-dividend policies, wherein the apportionment of dividends was

deferred for more than five years, in 1871. But it is alleged in the complaint, and is expressly admitted in the answer, that by sec. 87 of the general insurance laws of the state of New York, first enacted as ch. 118 of the General Laws of New York for the year 1868, it was provided that:

"Any domestic life insurance corporation which by its charter or articles of association is *restricted* to making a dividend only once in two or more years may hereafter, notwithstanding anything to the contrary in such charter or articles, make and pay over dividends annually, *or at longer intervals,* in the manner and proportions and among the parties provided for in such charter or articles."

By sec. 83 of the general insurance laws of the state of New York, first enacted as ch. 100 of the General Laws of 1872, it was provided that:

"Any domestic life insurance corporation may ascertain *at any given time, or from time to time,* the proportion of surplus accruing to each policy from the date of the last to the date of the next succeeding premium payment, and *may distribute* the proportion found to be equitable either in cash, in reduction of premium or in reversionary insurance, payable with the policy, and upon the same conditions as therein expressed at the next succeeding date of such payment, notwithstanding anything in the charter of such corporation to the contrary." R. S. N. Y. (Birdseye's ed.) pp. 1849, 1852.

Those provisions of the New York statutes were all considered by the court of appeals in *Greeff v. Equitable L. A. Soc.* 160 N. Y. 19, 26, 27, 31, 54 N. E. 712. That was an action by a policy-holder to recover $7,087.38 as the alleged unpaid balance of the defendant's net surplus, to which the plaintiff claimed to be entitled under the statutes mentioned. The policy in that case was issued July 1, 1882, and payable May 2, 1897, or upon the death of the assured if it occurred before, in the sum of $20,000. June 23, 1897, the company paid to the plaintiff $23,932 as the total amount due to the plaintiff in accordance with the express terms of the contract

as written. In the opinion of the court it was there said that:

"The plaintiff's claim that the whole surplus should be distributed cannot be sustained if it is in conflict with the provisions of the contract between the parties, without making a new contract for them, which the court will not do. Therefore this question depends for its solution upon a proper interpretation of the provisions of the policy. The parties agreed that the plaintiff should participate in the distribution of the surplus according to the methods and principles adopted by the company. It is to be observed that the agreement was that the plaintiff should participate, not in the whole surplus, but in the distribution of the surplus, or, in other words, in the surplus which, according to the defendant's methods and principles, was to be distributed."

Thus it appears that such "deferred-dividend insurance" is not only expressly authorized by the statutes of New York in question, but enforcible by the courts of New York. As conceded by the commissioner and his counsel, "the charter of the company is the source of its very existence." Certainly, the plaintiff "derives its existence, powers, and rights solely from the laws" of New York. 13 Am. & Eng. Ency. of Law (2d ed.) 837. The courts of that state are abundantly able to enforce and administer such laws. But that fact did not prevent this state from imposing such conditions and restrictions upon corporations of other states transacting business in this state as the legislature saw fit to impose. This was forcibly declared in *Paul v. Virginia,* 8 Wall. 168, and has frequently been sanctioned by the same court since, and has repeatedly been followed by this court. *State v. U. S. Mut. Acc. Asso.* 67 Wis. 629, 630, 31 N. W. 229, and cases there cited; *Ashland L. Co. v. Detroit S. Co.* 114 Wis. 78, 89 N. W. 904, and cases there cited. There is nothing in the record indicating that such deferred insurance policies were issued in violation of any statute of New York, and hence the revocation of the license cannot be justified on that ground.

2. But the principal ground urged in support of the judgment of the trial court is that the issuance of such deferred insurance policies to citizens of this state by the plaintiff and such other companies was in violation of the statutes of this state, and particularly the section which declares that:

"Every life insurance corporation doing business in this state upon the principle of mutual insurance, or the members of which are entitled to share in the surplus funds thereof, *may* make distribution of such surplus as they *may* have accumulated annually, or once in two, three, four or five years as the directors thereof *may* from time to time determine. In determining the amount of the surplus to be distributed *there shall be reserved* an amount not less than the aggregate net value of all the outstanding policies, said value to be computed by the American experience table of mortality with interest not exceeding four and one-half per cent." Sec. 1952, Stats. 1898.

There can be no doubt that during the period mentioned the plaintiff was an "insurance corporation doing business in this state upon the principle of mutual insurance," within the meaning of that section. The charter of the plaintiff declared that such business of the company should "be conducted upon the mutual plan;" and that it was so conducted is, in effect, conceded. So the members of the plaintiff corporation, under that section of the statute, were undoubtedly "entitled to share in the surplus funds thereof" whenever the "distribution" of the same should be made. The controversy is as to whether, under that section, it was competent for the plaintiff, by contract with citizens of this state, to defer such "distribution" for a longer period than five years.

The language of the section is that such corporation "*may* make distribution of such surplus . . . annually, or once in two, three, four or five years as the directors thereof *may* from time to time determine." The word "may," in its ordinary and common use, is certainly permissive and not mandatory. But it is claimed with much plausibility that,

if the purpose of the section was to make it optional with the directors of such corporation whether such distribution should be "annually" or "from time to time," as they might "determine," then the use of the words "once in two, three, four or five years" is without significance. Such language, however, is immediately followed in the section by the statement that "in determining the amount of the *surplus* to be distributed *there shall be reserved* an amount not less than the aggregate net value of all the outstanding policies, said value to be computed" as therein stated. There can be no question but that the words "shall be reserved," as thus used, are mandatory; and, since no distribution can be made except from such "surplus funds," nor from such funds until the amount thereof so "reserved" shall at least be equal to the "aggregate net value" mentioned, it is obvious that such distribution might thereby be wholly prevented during such five years. The two parts of the section relate to the same subject, and both must be considered in construing the same. Such use of the words "may" and "shall" in the same section has been said to afford a very forcible indication of the intention of the legislature. Sutherland, Stat. Constr. § 462; 2 Lewis's Sutherland, Stat. Constr. (2d ed.) § 640. It is there said that "the use of words that are plainly compulsory in one aspect, and the use of others which literally are permissive in another, necessarily leads to an inference that the primary meaning is to be retained." Thus, in a New York case, it is said by the court and held that:

"The words 'may' and 'shall' are both used; the former to confer a privilege, the latter as a mandate. It is presumed that the attention of Congress was drawn to the distinction between the ordinary import of the two words, and that they were used with reference to that distinction, and hence that, if it had been designed to limit prosecutions to the specified courts, the same word would have been employed as in limiting a particular proceeding to a specified court." *Cooke v. State Nat. Bank,* 52 N. Y. 96, 105, 106. To the same effect:

People ex rel. Comstock v. Syracuse, 59 Hun, 258, 267, 12 N. Y. Supp. 890; *Reynolds v. Board of Education,* 33 App. Div. 88, 53 N. Y. Supp. 75.

So the Indiana court has said that, where "the words 'shall' and 'may' are used in different connections, it very strongly indicates that the terms were so used deliberately, and with a due sense of discrimination, ascribing to each its literal signification. Statutory provisions upon the same subject should be construed wth reference to each other and as parts of the general system of jurisprudence, with a view of promoting harmony and symmetry in such system." *Budd v. Rutherford,* 4 Ind. App. 390, 30 N. E. 1112. So Mr. Justice MITCHELL, speaking for the Minnesota court, said that:

"In the body of the act it will be observed that the legislature has in every instance used the words 'may' and 'shall' in such a manner as to clearly show an intention to give to each its common meaning. The word 'may' is always used with reference to the granting of the extension, while the word 'shall' is uniformly used with reference to the conditions on which it is to be granted, as well as the acts to be performed by different officials, including the city council, after the extension has been granted." *State ex rel. Bell v. City Council,* 65 Minn. 299, 68 N. W. 31; *Minor v. Mechanics Bank,* 1 Pet. 46, 63, 64; *Rothschild v. New York L. Ins. Co.* 97 Ill. App. 547.

These cases will again be referred to later. Certainly a construction which would make the two clauses repugnant to each other should not be indulged unless absolutely required by the context. True, there are numerous cases where the word "may" has been construed to mean "must," but, as held in cases cited by counsel for the defendant, "the word *may* means *must* or *shall* only in cases where the public rights or interests are concerned, or where the public or third persons have a claim *de jure* that the power should be exercised." *Cutler v. Howard,* 9 Wis. 309; *Market Nat. Bank v. Hogan,*

21 Wis. 318. See, also, *State ex rel. Burnett v. Pierpont,* 29 Wis. 608; *State ex rel. McDill v. Board of Canvassers,* 36 Wis. 498, 506; *Dutcher v. Dutcher,* 39 Wis. 666. But as said by DIXON, C. J., in the first of these cases, "when the act to be done is not clearly beneficial to the public or third persons, the exercise of the power is held to be discretionary." The ruling in that case follows what is, perhaps, the leading case in this country upon the subject—*Newburgh T. Co. v. Miller,* 5 Johns. Ch. 101, 112, 113. Chancellor KENT there reviews the English cases on the subject with his usual learning and ability, and deduces the rule as mentioned. As indicated in some of those cases, where the word "may" is used in a statute which directs the doing of a thing for the sake of justice or the public good, or imposes a duty enforcible as such, it is to be construed as being mandatory. While sanctioning the ruling in that case, it was held in a more recent case in that state that:

"When a statute declares that an individual or individuals *shall* or *may* do certain acts, or have a certain remedy, which is intended for his or their own benefit, he or they have a discretion to do the act or pursue the remedy or not." *Malcom v. Rogers,* 5 Cow. 188.

See, also, *Mayor of N. Y. v. Furze,* 3 Hill, 612; *Buffalo & B. P. R. Co. v. Comm'rs,* 10 How. Pr. 237; *People ex rel. Conway v. Livingston Co.* 6 Hun, 572; *Medbury v. Swan,* 46 N. Y. 200; *State v. Sweetsir,* 53 Me. 438; *Brokaw v. Comm'rs,* 130 Ill. 482, 22 N. E. 596; *Seiple v. Elizabeth,* 27 N. J. Law, 407.

The general rule mentioned has long been recognized by the supreme court of the United States. *Minor v. Mechanics Bank,* 1 Pet. 46, 64. In that case Mr. Justice STORY, speaking for the court, adds, what may be instructive here, as follows:

"Without question, such a construction is proper in all cases where the legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power.

But no general rule can be laid down upon this subject further than that that exposition ought to be adopted in this, as in other cases, which carries into effect the true intent and object of the legislature in the enactment. The ordinary meaning of the language must be presumed to be intended unless it would manifestly defeat the object of the provisions."

In a late case construing a statute of the state of Louisiana and expressly sanctioning the language just quoted it was held that:

"The provision . . . that the surplus of the revenues of parishes and municipal corporations for any year may be applied to the payment of the indebtedness of former years is not mandatory, but only permissory, and creates no contract right in a holder of such indebtedness of former years which can be enforced by *mandamus.*" *U. S. ex rel. Siegel v. Thoman,* 156 U. S. 353, 15 Sup. Ct. 378.

Mr. Justice WHITE, writing the opinion of the court in that case, adds, by way of quotation and otherwise, that:

"It is only where it is necessary to give effect to the clear policy and intention of the legislature that such a liberty can be taken with the plain words of the statute." "In the law to be construed here it is evident that the word 'may' is used in special contradistinction to the word 'shall,' and hence there can be no reason for taking such a liberty. The legislature first imposes an imperative duty—the application of the revenue of each year to the expenses thereof—and then makes provision for the case of an excess of revenue over expenses. In the first the word 'shall' and in the latter provision the word 'may' is used, indicating command in the one and permission in the other." Pages 359, 360 (15 Sup. Ct. 380).

The facts in that case are, in some respects, similar to the facts in this case.

3. It is claimed by both parties that the history of the section in question shows the intention of the legislature in passing it. Sec. 1952, Stats. 1898. That section is the same

as sec. 14, ch. 59, Laws of 1870, and sec. 1952, R. S. 1878, except that up to the enactment of ch. 309, Laws of 1887, it also included accident insurance. It is pointed out by the defendant that the bill for the enactment of ch. 59, Laws of 1870, was reported by a committee under instructions "to inquire what legislation" was "necessary in regard to the business of insurance in this state, in order to afford proper *protection to policy-holders,* and more systematically to establish the regulation of insurance business in this state." It is, moreover, stated by the defendant and alleged in the answer, in effect, that prior to "1870 all life insurance companies doing business on the mutual plan in the United States had made provision for the distribution of profits or surplus among their policy-holders at periods of five years or less," or, as so alleged, in "one, two, three, four, or five years." It was expressly conceded by the defendant on the trial "that at the time of the passage of this act in 1870 the longest period for which dividends were deferred in mutual companies was five years." It is argued by the plaintiff that this of itself shows that the evil sought to be guarded against by that enactment was not an over-accumulation of assets and a failure to distribute dividends, but the lack of protection against insolvency. In other words, it is claimed that the object of such enactment was "to afford proper protection to policy-holders" by safeguarding the solvency of such insurance companies; that prior to that time the only requirement in that regard in this state was that such companies must have a paid-up capital of $100,000 without providing for any reserve, and requiring that an annual statement should be made to the secretary of state. That the purpose was to safeguard the solvency of such companies is apparent from the fact that the accumulation of reserve fund mentioned in section 14 of the act of 1870 (sec. 1952) is provided for in sec. 10 of the act of 1870 (sec. 1949). Up to the time of that

enactment the statute of Massachusetts on the subject used the permissive word "may" in connection with the distribution of the surplus fund, and the mandatory word "shall" in connection with such reserve fund. The same was true with the act of March 26, 1869, of Illinois, from which our ch. 59, Laws of 1870, was largely taken, and from which the tenth and fourteenth sections were almost literally copied. The only direct adjudication upon the language contained in sec. 1952, Stats. 1898, which is in substance the same as sec. 14, ch. 59, Laws of 1870, is an Illinois case. *Rothschild v. New York L. Ins. Co.* 97 Ill. App. 547. That case is in harmony with the adjudications mentioned, and expressly held that sec. 14 of that act "is not a grant of power, but is, perhaps, a limitation on the power of such companies to distribute their surplus funds oftener than once a year. In the absence of such a provision the time of distribution would depend on the directors, except so far as limited by the charter of the company or valid by-laws." After discussing the rules of construction generally, the court used this language:

"Applying these rules to the words 'may' and 'shall' in sec. 14, the former must be regarded as permissive and the latter as imperative. We can conceive of no good reason, nor are we aware of any rule of interpretation, which would warrant the holding that the words 'may' and 'shall' are used in the same sense in the section, and that imperative. Therefore we cannot sustain the contention that the section requires distribution of surplus at least once in every five years, or that the contracts between the company and appellant, assuming that such contracts contain the charter provision in regard to distribution of surplus, are in violation of sec. 14." Page 555.

We see no escape from the conclusion thus reached. For more than thirty years prior to the controversy in question the language of the statute has remained substantially the same. During that time it has seemed to be the consensus of opinion

on the part of state officials and legislators, as well as such insurance companies, that the time of distribution was permissive, but that the amount of the reserve fund was mandatory. Apparently upon the faith of such opinion the vast aggregate amount of deferred-dividend insurance policies mentioned was issued. That such was the consensus of opinion is manifest from the fact that the insurance commissioner attempted in 1901 and again in 1903 to have the section of the statute in question amended so as to make the time of such distribution mandatory instead of being permissive, as indicated. But such efforts failed.

Thus it appears that the history of the section and the practical construction given to it are in harmony with the permissive meaning of the word "may" and the mandatory meaning of the word "shall" as ordinarily understood, and we find nothing in the context of the section, nor any of the rules of law mentioned, requiring us to give to those words a different meaning. There is nothing in the record to indicate that the plaintiff has failed to comply with any provision of law of this state, much less that it has violated any law of this state, within the meaning of the statutes authorizing a revocation of such license to do business in this state. Secs. 1955, 1968, 1972*a*.

4. It should be observed that the trial court not only affirmed the decision of the insurance commissioner in revoking the plaintiff's license to do business in this state, but also found, as a conclusion of law, that the issue of such dividend policies by the plaintiff, in which the distribution was deferred beyond a period of five years, was "unlawful;" and judgment was entered thereon accordingly. Thus it was adjudged in this action that the numerous policies issued by the plaintiff to citizens of this state, aggregating several millions of dollars, as found by the trial court, were all *unlawful,* and that, too, without any of the holders of such policies having been made parties, or given a hearing, or having appeared in

the action. Such gratuitous finding and adjudication must have escaped the notice of the learned trial judge.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with direction to grant the relief prayed for in the complaint.

A motion for a rehearing was denied May 2, 1905.

KERWIN, J., took no part in the decision.

INDEX.

ABATEMENT AND REVIVAL.

See SPECIFIC PERFORMANCE, 2.

1. Upon an application to revive and continue an action against representatives of a deceased defendant the question of laches is not, as in the case of a limitation, a mere matter of time, but is principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relation of the property or parties. *Fleming v. Ellison*, 36
2. In an action for specific performance of a contract to convey land, it is *held* that there was no laches and that it was an abuse of discretion to deny an application to revive against defendant's administrator upon a supplemental complaint electing, because defendant had conveyed to a third person, to take damages instead of specific performance, although the application was made after the time for presenting claims against defendant's estate had expired, and no claim for damages had been presented. *Ibid.*

ABUTTING OWNERS. See MUNICIPAL CORPORATIONS, 2–16.

ACCEPTANCE. See CONTRACTS, 11, 13. RAILROADS, 9, 10. REFORMATION OF INSTRUMENTS, 3. SPECIFIC PERFORMANCE, 3, 4.

ACCOMPLICES. See CRIMINAL LAW, 11.

ACCOUNTING. See COURTS, 1. PARTNERSHIP, 7–13.

ACTION.

Cause of action: What constitutes. See ACTION, 2, 3.

Same: When accrues. See PARTNERSHIP, 10.

Same: Where accrues: Local action. See LIMITATION OF ACTIONS, 3.

Same: Change from equity to law. See SPECIFIC PERFORMANCE, 2.

Joinder of causes of action.

1. The terms of sec. 2647, Stats. 1898, "The plaintiff may unite in the same complaint several causes of action, whether they be such as were formerly denominated legal or equitable, or both, where they arise out of the same transaction or transactions connected with the same subject of action," should be liberally construed according to the rule as to remedial laws. *Emerson v. Nash*, 369
2. To constitute a cause of action there must be a right possessed by one or more persons and a violation thereof by another or others. The basic element is commonly called a "primary right." *Ibid.*
3. The "primary right" spoken of is not the transaction of the statute. That is distinct from the immediate elements of the cause of action, since the latter arise out of the former. *Ibid.*

4. A circumstance in which two or more persons are concerned, involving two or more remediable rights, constitutes the point of unity at which several possible causes of action may unite. Two or more causes of action may arise therefrom by violations of two or more of such rights, each right being primary in the sense that when violated the two essential elements of a cause of action constituting a wrong to be remedied exist. *Ibid.*

5. When several such violated primary rights have such proximate relation to a major circumstance that it may reasonably be said that in the regular course of events the latter is the source of the former, then several causes of action arise out of such circumstances, within the meaning of the statute, and such circumstance is the transaction of the statute. *Ibid.*

6. Any event in which two or more persons are actors, involving a right which may presently, or by what may proximately occur in respect thereto, be violated, creating an actionable wrong, is a transaction within the meaning of the statute. All such wrongs, which in the regular course of events through the rights violated have such proximate relation to that transaction that it may be legitimately said they arise out of it, are redressible in one action regardless of the form of the remedy requisite as to each, providing they affect all the parties and do not require different places of trial. *Ibid.*

7. The term "transactions connected with the same subject of action" refers to a different situation than "causes of action arising out of the same transaction." The former applies generally, if not exclusively, to matters which might constitute a source of independent causes of action, yet is so germane to the primary matter, the suit being in equity, as to be regarded really a part thereof. *Ibid.*

8. The term "primary right" used as a designation of that which, when violated, will constitute a ground for judicial redress, may in an equitable action include other rights which are also primary in the sense that they might constitute separate grounds of complaint, but which by reason of their relation to the dominant purpose of the suit are deemed to be embodied therein. *Ibid.*

9. When a contract between two or more persons on one side and two or more persons on the other creates a situation involving presently or proximately separate rights upon one side, each of which, with a violation thereof by the other side, would constitute a complete ground of complaint for judicial redress, the initial circumstance,—the making of the contract,—is a "transaction," within the meaning of the statute, and such grounds of complaint, should they arise, would be separate "causes of action arising out of the same transaction," within the meaning of the statute. *Ibid.*

By whom action may be brought or maintained. See DEEDS, 3. INSURANCE, 6. MUNICIPAL CORPORATIONS, 16. PARTNERSHIP, 8, 10, 13.

Limitations. See LIMITATION OF ACTIONS.

Abatement and revival of action. See ABATEMENT AND REVIVAL.

Consolidation of actions for trial: Order of trial.

10. Refusal to consolidate an action against a city to recover for injury to plaintiff's lot by the cutting down of the street in front

thereof with an action against the city, its treasurer, and the contractor, to set aside a special assessment certificate issued for such work to said contractor, and for other relief, is *held* not to have been error; nor was it error to direct the trial of the action at law first, immediately followed by that of the suit in equity, the court having control of both cases at the same time. *Haubner v. Milwaukee,* 153

ADJOINING LANDOWNERS.

See ADVERSE POSSESSION.

1. An encroachment by one person into the domain of another, that other not being prejudiced in the occupancy of his land up to the boundary line between the two, as for example by such person projecting the eaves of his building over the boundary line, is remediable at the suit of such other to enjoin as a continuous trespass. *Huber v. Stark,* 359
2. It is no ground for mitigation of damages caused to the property of one person by a trespass thereon that if such property had been in a good state of repair the wrongful invasion would not have damaged it. *Ibid.*
3. If one person without consideration verbally grants the use of his land to another, regardless of whether when the permission is given the parties contemplate that the privilege will be permanent, and whether such other enters upon the land and expends money thereon to facilitate the enjoyment of such privilege, the transaction creates only a mere license revocable at the pleasure of such person. *Ibid.*
4. "No one has a right, by an artificial structure of any kind upon his own land, to cause the water which falls and accumulates thereon in rain or snow to be discharged upon the land of an adjacent proprietor. Such an erection, if it occasions the water to flow either in the form of a current or stream, or only in drops, works a violation of the adjoining proprietor's right of property, and cannot be justified, unless a right is shown by express grant or by prescription." *Ibid.*

ADJOURNMENTS. See COURTS, 2, 3.

ADMINISTRATORS. See EXECUTORS AND ADMINISTRATORS.

ADMISSIONS. See EVIDENCE, 3, 4.

ADVERSE POSSESSION.

1. According to the courses and distances in two conveyances by the same grantor to different grantees, there remained a strip between the two tracts conveyed, but one deed described the tract thereby conveyed as bounded on the south by the other tract, and the other deed referred to a corner of the first tract as being on the north boundary line of the second. There was a rail fence upon what was understood to be the line between the tracts, but in fact this was at one end about ten feet and at the other about eighteen feet south of the north line of the southern tract as described by courses and distances. The grantees and those claiming under them respectively occupied up to this line uninterruptedly and without dispute for more than twenty years, and during that time built a new division fence on such

line, each building one half thereof. *Held*, that this established title by adverse possession up to said line in the owners of the northern tract. *Off v. Heinrichs*, 440

2. After the title was so established, L., the owner of the northern tract, conveyed by the same description as in the original deed of that tract, and a plat was made and recorded, which, as to its south boundary, was in accordance with the courses and distances in said description, leaving a strip between such plat and the old fence line. Afterwards the southern part of the tract was reconveyed to L. by deed designating the southern boundary as the north line of the southern tract, the same as in the original deed—and L. thereupon resumed possession and occupancy up to the old fence line. *Held*, that the title up to such old fence line thereby became revested in L., although in the meantime the owner of the southern tract had recorded a plat, making the north line thereof the same as the south line of the plat above mentioned. *Ibid.*

ADVICE OF COUNSEL. See MALICIOUS PROSECUTION.

AGENCY. See PRINCIPAL AND AGENT.

AMBIGUITY in deed. See DEEDS, 5.

AMENDMENT.
Of pleading. See CONTRACTS, 12. NEGLIGENCE, 2.
Of statutes. See BASTARDY, 1. COUNTIES, 3. MUNICIPAL CORPORATIONS, 6, 7, 9. RAILROADS, 7.

APPEAL AND ERROR.

Decisions reviewable: Appealable orders. See NEW TRIAL, 1.

1. An order appointing a referee under sec. 3, ch. 300, Laws of 1899 (providing for a special proceeding for the sale of future contingent interests in lands), is not a "final order" within the meaning of subd. 2, sec. 3069, Stats. 1898. *Kingston v. Kingston*, 263

2. The provision in sec. 3047, Stats. 1898, that appeals may be taken from "interlocutory judgments," has no application to interlocutory orders in special proceedings. *Ibid.*

3. An order striking out, as irrelevant, portions of a complaint is not appealable. It does not determine the action or prevent a judgment from which an appeal might be taken, within the meaning of subd. 1, sec. 3069, Stats. 1898. *Wiesmann v. Shanley*, 431

4. An appeal from a discretionary order will be dismissed if there was no abuse of discretion. *Eggen v. Fox*, 534

Exceptions in court below. See JURY, 11.

Bill of exceptions. See JURY, 11.

5. Neither the charge of the trial court nor its rulings in respect thereto being preserved in a bill of exceptions, alleged errors in such charge cannot be reviewed on writ of error. *James v. State*, 130

6. Exceptions to instructions not preserved in a bill of exceptions cannot be reviewed upon appeal. *Ullman v. State*, 602

Dismissal of appeal. See APPEAL, 4, 13. COUNTIES, 4. JUSTICES' COURTS, 4.

7. In the absence of statutory provisions to the contrary the dismissal of an appeal removes the case from the appellate court

and places the parties in the same condition as they were before the appeal was taken. *Silverman v. Fidelity & C. Co.* 459

Conclusiveness of former decision: Res judicata. See JUDGMENT, 5.

Affirmance and reversal: Material and immaterial errors. See ABATEMENT, 2. ACTION, 10. BASTARDY, 2–5. CONVERSION. CRIMINAL LAW, 2, 9–11, 14. EVIDENCE, 5. FISH AND GAME, 3, 4. GUARANTY, 1, 4. HOMICIDE, 7–9, 12, 13. JUDGMENT, 1. MASTER AND SERVANT, 1–3, 5–7, 15, 17, 18. NEGLIGENCE, 2–7. TRIAL, 1, 2.

8. Affirmance on equal division of court. *Francisco v. Hatch,* 220

9. Rejection of evidence offered to impeach immaterial testimony elicited from the opposite party on cross-examination, is not a material error. *Madler v. Pozorski,* 477

10. An erroneous instruction is not cured, nor the presumption of prejudice therefrom overcome, by a correct statement of the law on the same subject elsewhere in the charge. *Schmidt v. State,* 516

11. A statement by counsel for the plaintiff that an insurance company had undertaken to pay any judgment recovered against defendant in the action, made in the presence of jurors in the course of a colloquy between the court and counsel on both sides respecting a question asked of a juror upon his *voir dire,* is *held,* under all the circumstances and in view of the instructions to the jury to disregard any such statements, not to have constituted prejudicial error. *Faber v. C. Reiss Coal Co.* 554

Judgment after reversal: Power of trial court.

12. Under sec. 3071, Stats. 1898, where the supreme court reversed the judgment of the trial court and remanded the cause "with directions to enter judgment dismissing the complaint," the trial court had no power to enter any different judgment in the action, even though the parties made no objection or voluntarily submitted, as prescribed in sec. 2788, a matter in controversy arising out of an order relative to the rents and profits of the land in suit, made prior to the judgment appealed from. *Kuenzli v. Burnham,* 480

Appeal from county court: Dismissal: Judgment.

13. Sec. 4037, Stats. 1898, does not authorize the circuit court, upon dismissing an appeal from the county court, to remand the cause for further proceedings in accordance with the findings of the circuit court, especially where such proceedings would necessitate the vacation of the judgment appealed from. *Silverman v. Fidelity & C. Co.* 459

Appeal from justices' courts. See JUSTICES' COURTS, 4.

Appeal from county board. See COUNTIES, 4. TAXATION, 13.

APPEALABLE ORDERS. See APPEAL, 1–4.

APPORTIONMENT of indebtedness on division of town. See TOWNS.

ARREST AND EXAMINATION: Complaint. See CRIMINAL LAW, 1.

ASSAULT.
With intent to rape. See CRIMINAL LAW, 12.
With intent to kill. See HOMICIDE, 3–13.

ASSESSMENTS for street improvements. See MUNICIPAL CORPORATIONS, 2–16.

ASSESSORS. See TAXATION, 4–7, 11.

ASSIGNMENT.

Of fund not yet in existence: Equitable lien.

A writing given by H. to K., authorizing one M. to pay to K. all sums to become due upon subsequent sales of milk by H. to M.—there being an expectation that such sales would be made, but no binding contract between H. and M. to that effect—did not pass any legal interest in any such sum not actually paid over to K., or give him any equitable lien thereon, as against a subsequent garnishment of M. by another creditor of K. *O'Niel v. Wm. B. H. Kerr Co.* 234

Of check. See BANKS AND BANKING.

Of note and mortgage: Fraud. See GARNISHMENT.

Of insurance policy: Married women. See INSURANCE, 3, 4.

Of judgment. See JUDGMENT, 2.

ASSUMPTION OF RISK. See MASTER AND SERVANT, 11, 14, 15, 19.

ATTORNEYS.

Improper statements before jury. See APPEAL, 11.

Advice of. See MALICIOUS PROSECUTION.

Purchase at tax sale. See TAX TITLES, 1, 2.

BANKS AND BANKING.

See GARNISHMENT. TAXATION, 2–4. TAX TITLES, 1–3.

1. Where a check upon another bank is indorsed by the payee and deposited in the bank in which he keeps an account, and the latter banks accepts it and credits the amount as cash to the depositor's account, to be checked against as he sees fit, these acts indicate, *prima facie*, the completed transfer of the check, by which the bank accepting it becomes the owner thereof and not a mere agent to collect. *Aebi v. Bank of Evansville,* 73
2. In such a case the payee of the check is chargeable only as an indorser, and to charge him as such the check must be presented for payment within a reasonable time. *Ibid.*
3. The bank receiving the check in such a case mailed it on the same day (Sept. 21) to the drawee bank, located in a city seventeen miles distant. It gave the matter no further attention until about Oct. 1, when it learned that the check had not reached its destination and was lost. It did not notify the payee until Oct. 19, and presentment of a duplicate was not made until Oct. 26, when payment was refused, the drawer having then no funds in the drawee bank, although at several times after Sept. 21, including Oct. 1–3, he had had a balance there exceeding the amount of the check, and up to Oct. 23 was in apparent credit at the bank to an amount more than sufficient to satisfy the demand. *Held,* that prior to Oct. 19 the payee had been discharged from liability as indorser. *Ibid.*
4. The payee having been absolutely discharged, any renewal of his liability must be by new contract; and his co-operation with the indorsee bank in obtaining and indorsing a duplicate check, at the request of such indorsee and to enable it to obtain the money from the drawee, did not amount to a waiver of the previous omissions of the indorsee or to an agreement to assume a new liability. *Ibid.*

5. Only when an indorser was informed of all the material facts resulting in his discharge from liability, will a new promise of liability be implied from acts which otherwise might justify such implication. *Ibid.*

BASTARDY.

1. Sec. 1535, Stats. 1898 (under which one found guilty of bastardy is to be charged in the judgment with the *future maintenance* of the child and also "for the care and support of such child since its birth"), does not change the rule which obtained prior to the revision of 1878 (under statutes providing for the *maintenance* of the child) that defendant is to be charged with such maintenance from the birth of the child onward. *Sonnenberg v. State,* 124
2. An instruction that before the jury could find defendant guilty they must be satisfied that he had sexual intercourse with the complainant during a time in which, in the ordinary course of nature, the child could be begotten, was not erroneous. *Ibid.*
3. An instruction that the guilt of defendant must be proved beyond a reasonable doubt, but if the jury believe the testimony of the complainant and her statement that she did not have intercourse with any other man, and that it is proved beyond a reasonable doubt that the defendant is the father of the child, they should find him guilty, was not erroneous. *Ibid.*
4. A judgment in bastardy proceedings requiring defendant to pay the costs "forthwith," means as soon as they are taxed, and delay in the taxation for two weeks is not prejudicial. *Ibid.*
5. Allowing defendant twenty days in which to give the bond required by the judgment is not error of which he can complain. *Ibid.*

BENEFIT ASSOCIATIONS. See INSURANCE, 7, 8.

BILL OF EXCEPTIONS. See APPEAL, 5, 6. JURY, 11.

BILL OF SALE. See SALES, 1, 2.

BILLS AND NOTES. See BANKS AND BANKING. GARNISHMENT. GUARANTY, 2. JUDGMENT, 2.

BOARD OF HEALTH. See HEALTH. JUSTICES' COURTS, 2.

BOARD OF REVIEW. See DEPOSITIONS. TAXATION, 6–10.

BONDS.
For maintenance, etc. See BASTARDY, 5.
Of guardian. See GUARDIAN AND WARD.

BOUNDARIES. See ADVERSE POSSESSION. EJECTMENT.

BRIBERY.

Even though an ordinance pending before a city council attempts to grant a privilage which in law the council has no right to grant, yet if it deals with a subject over which the council has jurisdiction and the members of the council have a right to vote thereon, the voting on such ordinance is action by such members in their official capacity, and if one of them receives money from any person under an understanding or agreement that his vote, judgment, or action on the matter shall be influenced thereby, he is guilty of an offense under sec. 4475, Stats. 1898. *Murphy v. State,* 635

BRIDGES. See HIGHWAYS AND BRIDGES, 2–4.

BROKERS.

See CONTRACTS, 3.

1. Where plaintiff, having authority to offer certain land for sale and to submit bids therefor to the owner, agreed with defendant that if the latter should find a purchaser the profits should be equally divided, but no exclusive agency was transferred to defendant, it was not inconsistent with such contract for plaintiff to endeavor to make a sale to defendant's customer. *Madler v. Pozorski,* 477

2. Such an agreement by plaintiff was not inconsistent with his duty to the owner of the land, if there was no fraud, deception, or unfair dealing in his relations with such owner. *Ibid.*

3. Unfair dealing by defendant with the owner, in which plaintiff did not participate, would not affect plaintiff's right to recover his share of the profits made by defendant on a sale of the land. *Ibid.*

4. In an action to recover for services in negotiating an exchange of lands, the evidence being conflicting as to the terms of the oral contract under which plaintiff claimed, it is *held* that it was a question for the jury whether he had earned the agreed commission. *Schultz v. Eberle,* 594

BUILDING CONTRACTS. See CONTRACTS, 4–13. DAMAGES.

BURDEN OF PROOF. See FISH AND GAME, 8. HUSBAND AND WIFE, 3. TAXATION, 3.

CAPITAL OF BANK. See TAXATION, 2–4.

CARRIERS. See RAILROADS, 9, 10.

CAUSE OF ACTION. See ACTION, 2–9.

CERTIORARI.

See TAXATION, 10.

The petition for a writ of *certiorari* should specify the jurisdictional defects relied upon, and defects not so pointed out will not be considered. *Tourville v. S. D. Seavey Co.* 56

CHALLENGE to the array. See JURY, 5–12.

CHANGE OF GRADE. See MUNICIPAL CORPORATIONS, 2–10.

CHATTEL MORTGAGES. See SALES, 1, 2.

CHECKS. See BANKS AND BANKING.

CIRCUIT COURTS. See APPEAL, 12, 13. COURTS, 1.

CITIES. See MUNICIPAL CORPORATIONS.

CLAIMS.
Against decedents. See ABATEMENT. PARTNERSHIP, 12.
Against counties. See COUNTIES, 2–4. TAXATION, 12–18.

CO-EMPLOYEES. See MASTER AND SERVANT, 8–10. RAILROADS, 14.

COMMERCE.

1. Interstate commerce conducted by corporations organized within different states stands upon the same footing under the federal constitution as interstate commerce conducted by individuals. *Greek-American S. Co. v. Richardson D. Co.* 469

2. A contract for the sale of a lawful article of commerce in its original package while it was an article of interstate commerce is not governed by sec. 1770*b*, Stats. 1898, prescribing conditions upon which foreign corporations may transact business in this state and depriving them in certain cases of the right to recover upon contracts made before compliance with its provisions. *Ibid.*

3. By the terms of an agreement for the sale of a bale of sponges by plaintiff, a foreign corporation, to defendant, a domestic corporation, two bales were to be shipped from Chicago to Milwaukee for inspection and defendant was to have the right to choose one or to reject both. The bales were shipped accordingly, with other goods, to plaintiff's agent in Milwaukee, who at defendant's request opened the bales and examined their contents and then, after refastening them as they were before, delivered one to defendant. *Held*, that the goods delivered had not lost their character as articles of interstate commerce, and that the right of plaintiff to enforce payment therefor was not affected by sec. 1770*b*, Stats. 1898. *Ibid.*

COMMISSIONS ON SALES. See BROKERS. CONTRACTS, 3.

COMMON CARRIERS. See RAILROADS, 9, 10.

COMPLAINT. See ACTION, 1–9. APPEAL, 3. CRIMINAL LAW, 1. EJECTMENT. FISH AND GAME, 2. NEGLIGENCE, 2. PARTNERSHIP, 7, 9, 13. PLEADING, 1–3.

CONDEMNATION OF LAND. See RAILROADS, 3–8.

CONDITIONS.
Precedent. See COUNTIES, 2. HIGHWAYS, 3, 4.
Subsequent. See DEEDS, 1, 2.

CONFESSIONS. See RAPE, 2.

CONSIDERATION. See DEEDS, 2, 3. GUARANTY, 1–3.

CONSOLIDATION of actions. See ACTION, 10.

CONSTABLES. See COUNTIES, 2–4.

CONSTITUTIONAL LAW.
Interstate commerce. See COMMERCE.
Preservation of fish, etc. See FISH AND GAME, 1.
Vested rights. See MUNICIPAL CORPORATIONS, 9.

CONTAGIOUS DISEASES. See HEALTH.

CONTINGENT INTERESTS in land: Sale. See APPEAL, 1.

CONTRACTS.

See BROKERS. PARTNERSHIP.

Validity: Statutes construed. See COMMERCE. HEALTH. INSURANCE, 1–4.

Same: Statute of frauds. See FRAUDS, STATUTE OF. SPECIFIC PERFORMANCE, 3–5.

Fraud: Illegality. See TAX TITLES, 1.

Parties: Infants. See INFANTS. MASTER AND SERVANT, 1–7.

Same: Married women. See INSURANCE, 3, 4.

Made through agents. See PRINCIPAL AND AGENT. REFORMATION, 4. SPECIFIC PERFORMANCE, 3.

Made by public officers. See HEALTH.

Offer and acceptance. See SPECIFIC PERFORMANCE, 3, 4.

Consideration. See DEEDS, 2, 3. GUARANTY, 1-3. JUDGMENT, 2.

Implied contracts: Necessaries furnished to wife. See HUSBAND AND WIFE, 2, 3.

Same: Services of minor. See MASTER AND SERVANT, 1-7.

Construction. See DEEDS. REFORMATION, 4. SALES. TOWNS.

Same: Parol or extrinsic evidence. See DEEDS, 4, 5. REFORMATION, 4. SALES, 2.

Modification: Ratification. See GUARANTY, 3.

Reformation for mistake. See DEEDS, 3. REFORMATION.

Assignment. See ASSIGNMENT. BANKS, 1. JUDGMENT, 2.

Performance: What constitutes.

1. Where one of the issues to be determined by a jury is whether the plaintiff substantially performed his contract, they should be made to understand what constitutes such performance. *Manning v. School District,* 84

2. Substantial performance means full performance in all those essentials necessary to the accomplishment of the entire purpose of the contract. Failure as to any of such essentials, whether in good faith or bad faith, or any defect so essential as that the object which the parties intended to accomplish, to have a specified amount of work performed in a particular manner, is not accomplished, is inconsistent with substantial performance. *Ibid.*

3. If a person contracts with another to obtain options for that other to purchase real estate in case he shall upon examination thereof elect to do so, and such person, pursuant to his obligation, negotiates with a third person to obtain such an option and thereby brings to such other's attention the subject of the transaction in aid of enabling him to obtain the land if he desires to do so, and before a formal option shall have been obtained such other concludes to make the purchase and does so, he thereby becomes liable to such person as upon a full performance of his agreement. *Emerson v. Nash,* 369

Acceptance of deed as fulfilling contract. See REFORMATION, 3.

Substantial and partial performance: Measure of recovery. See DAMAGES.

4. It is error to instruct that the measure of the contractor's right to recover on a contract which he has in good faith substantially performed is the contract price. *Manning v. School District,* 84

5. If one only substantially performs his contract to improve another's property, the circumstances being such that it would be impracticable for such other to reject the incomplete work, that one can, nevertheless, if his failure to fully perform is not characterized by bad faith, recover on the contract, but the measure of his recovery is the contract price less such deductions therefrom as will measure the difference between full and partial performance. *Ibid.*

6. The right to recover on a contract for substantial performance does not involve any judicial modification of the contract to the prejudice of the proprietor. While he may be made to respond thereon for substantial performance he is entitled to such

reduction from the contract price as will, in effect, render to him that full performance called for by the contract. *Ibid.*

7. The rule for measuring the modification of the contract price so as to account for the difference between substantial and full performance is this: So far as the imperfections can be remedied without any great sacrifice of work and material wrought into the subject of the contract, the reasonable cost of actually making good such defects is to be allowed, and so far as it is otherwise the proper allowance is the diminished value of the subject of the contract by reason thereof. *Ibid.*

8. When one contracts with another to perform a stipulated service for such other for a stipulated price, the sum to be paid when the work shall be satisfactorily done, such other is the one to be satisfied, and until the happening of that event, so long as he acts reasonably, the contract price is not collectible. *Ibid.*

9. The rule which permits of a recovery on a contract for substantial performance thereof, without any other acceptance of the results than such as is unavoidable, does not apply to mere partial performance. *Ibid.*

10. Where the property and labor of a person has been wrought into the property of another resulting in a good-faith part performance of a contract, but not substantial performance thereof, the circumstances being such that the former situation cannot practicably be restored, that other is not liable at all to the contractor merely because he is enriched to the latter's loss. *Ibid.*

11. To make one liable on a contract under the circumstances stated in the last rule, there must be the additional element of acceptance of the work other than that appropriation and use thereof necessarily involved in the use of the property of which it forms a part. *Ibid.*

12. If one sues on a contract, he cannot recover *quantum meruit* without an amendment to the complaint setting forth a cause of action of that character. *Ibid.*

13. In case of mere part performance of a contract and such acceptance of the result as to entitle the contractor to recover *quantum meruit*, the measure of his recovery is the reasonable value of the part performance upon a *quantum meruit pro rata* basis, i. e., on the basis of the value of full performance at the contract rate. *Ibid.*

Part performance as ground for relief. See SPECIFIC PERFORMANCE, 4, 5.

Negligent performance. See RAILROADS, 9.

Right to recover on sale: Effect of state statute. See COMMERCE.

Compelling specific performance. See ABATEMENT, 2. SPECIFIC PERFORMANCE.

Rescission. See DEEDS, 2. PLEADING, 5.

Wrongful declaration of forfeiture. See INSURANCE, 5, 6.

Release of sureties: New bond. See GUARDIAN AND WARD.

Discharge of indorser: Renewal of liability. See BANKS, 4, 5.

Several causes of action arising from one contract: Joinder. See ACTION, 9.

CONTRIBUTORY NEGLIGENCE. See HIGHWAYS, 6, 9. MASTER AND SERVANT, 10, 11, 14, 15, 19.

CONVERSION OF PERSONALTY.

See FRAUD, 2. GUARDIAN AND WARD, 2.

1. In an action against a sheriff and undersheriff for the conversion of personal property contained in a houseboat levied upon by the officers, it was not error to instruct the jury that if the person placed in charge of the boat by the defendants forbade plaintiff to take the property, knowing or having been informed that plaintiff was the owner thereof, this was a denial by defendants of plaintiff's right and amounted to a conversion of the property. *Lucas v. Sheridan*, 567

2. The evidence in such action—tending to show, among other things, that after the levy upon the houseboat the defendants removed plaintiff's goods therefrom and put them upon the beach, but forbade the plaintiff to take them away; that while lying upon the beach the goods were rained upon and injured; and that two or three days later defendants offered to let plaintiff have the goods, but he then refused to take them because they had been spoiled—is *held* to sustain a verdict for the plaintiff. *Ibid.*

3. It was not error to instruct the jury that if, after removal from the boat, the goods had been materially injured by rain or otherwise, or had been in part carried away by persons unknown, plaintiff was not bound to accept defendants' offer of return, but was entitled to recover the fair value of the property. *Ibid.*

CONVEYANCES. See ADVERSE POSSESSION. DEEDS. MORTGAGES, 1. REFORMATION. SPECIFIC PERFORMANCE.

CORPORATIONS.

Foreign corporations: Sales in this state: Right of recovery. See COMMERCE.

Foreign life insurance companies: Powers: Distribution of surplus: Revocation of license. See INSURANCE, 1, 2. JUDGMENT, 1.

Banks: Taxation of capital. See TAXATION, 2–4.

Railroad companies: Organization: Condemnation of land, etc. See RAILROADS.

Municipal corporations. See MUNICIPAL CORPORATIONS.

CORROBORATION. See CRIMINAL LAW, 11.

COSTS. See BASTARDY, 4. EXECUTORS. GARNISHMENT, 4. TAXATION, 17.

COUNTERCLAIM. See PLEADING, 5–7.

COUNTIES.

County board: How far supervisor represents town.

1. The supervisor from a town, while acting in his capacity as a member of the county board, cannot be deemed to represent or stand in the place of the town in a capacity adverse to the county. *Outagamie Co. v. Greenville*, 77 Wis. 165, distinguished, and language used therein disapproved. *Spooner v. Washburn Co.* 24

Same: Jurisdiction: Allowance of claims.

2. Strict compliance with sec. 680, Stats. 1898, is a condition precedent to jurisdiction of the county board to allow the claim of a constable for services performed in a justice's court in an action wherein the state is a party and the county is liable for such services. The provision that "such fees shall be . . . al-

lowed by the county board in the manner following, *and in no other way*," cannot be held to be merely directory. *Birdsall v. Kewaunee Co.* 576

3. Sec. 680, R. S. 1878, having been amended by ch. 117, Laws of 1880 (adding "officers" to those whose claims were required to be audited in the manner therein prescribed), in so far as the amended section (now sec. 680, Stats. 1898) is repugnant to sec. 677, R. S. 1878 and Stats. 1898, the latter section must be regarded as modified accordingly. *Ibid.*

4. Where a county board had no jurisdiction to allow a claim, an appeal from its disallowance thereof confers no jurisdiction upon the circuit court except to dismiss the proceeding. *Ibid.*

Same: Accounting with towns for delinquent taxes. See TAXATION, 12–18.

Refund to purchaser at void tax sale. See TAX TITLES, 3.

Aiding towns in construction and repair of bridges. See HIGHWAYS, 1–4.

Judgments against counties: Execution: Lien on lands.

[5. Whether land owned by a county can be levied upon and sold on execution, not determined. The remedy for collection of a judgment by compelling the levy of a tax should be pursued, at least until it proves ineffectual.] *Buell v. Arnold,* 65

6. The docketing of a judgment against a county does not create a lien upon its lands under sec. 2902, Stats. 1898,—not even upon lands to which it has taken title under tax deeds in proceedings to collect the taxes thereon. The word "person" in said section does not include a county, notwithstanding the provision of subd. 2, sec. 4972, Stats. 1898, that such word "shall extend and be applied to bodies corporate unless plainly inapplicable." *Rains v. Oshkosh,* 14 Wis. 372, distinguished. *Ibid.*

COUNTY BOARD. See COUNTIES, 1–4. TAXATION, 12–18.

COUNTY COURTS. See APPEAL, 13. COURTS, 1.

COURT AND JURY. See CONVERSION, 2. CRIMINAL LAW, 9. FISH AND GAME, 6. HIGHWAYS, 9. HOMICIDE, 4. HUSBAND AND WIFE, 1. MASTER AND SERVANT, 10, 14. RAILROADS, 10–12. TRIAL. WATERS.

COURTS.

Supreme court. See APPEAL AND ERROR.

Circuit courts. See APPEAL, 13.

1. The circuit court has jurisdiction of an action by the personal representative of one deceased partner for an accounting and settlement of the partnership affairs, although the estate of a subsequently deceased partner is in process of settlement in the county court, where there is a surviving partner who is a necessary party and against whom judgment cannot be recovered in the county court. *Stehn v. Hayssen,* 583

County courts. See APPEAL, 13. COURTS, 1.

Municipal courts.

2. The municipal court of Douglas county was required by law (sec. 6, ch. 112, Laws of 1893) to be held in a room in the city hall of Superior, to be provided by said city, but discretion was given to the judge to try cases in some room in the court house

of the county when he should deem it more convenient. *Held*, that failure to state in the docket the place to which an adjournment was taken was not fatal to the jurisdiction, the necessary inference in such a case being that the place where the summons was made returnable was the place where the cause would be called for trial after the adjournment. *Tourville v. S. D. Seavey Co.* 56

3. Secs. 3630, 3631, Stats. 1898, relating to adjournments in justices' courts, do not apply to the municipal court for Rock county. The character of that court as a court of record, conferred by ch. 197, Laws of 1881, is not taken away by those provisions of said chapter which vest in it the powers and jurisdiction of justices of the peace and declare that the general provisions of law relative to actions before justices shall be applied so far as appropriate. *Snyder v. Malone*, 114

District court of Milwaukee. See JUSTICES' COURTS.

Justices' courts. See JUSTICES' COURTS.

COVENANT or condition subsequent. See DEEDS, 2.

CREDITORS' REMEDIES. See ASSIGNMENT. COUNTIES, 5, 6. GARNISHMENT. JUDGMENT, 2. PARTNERSHIP, 1–6.

CRIMINAL LAW AND PRACTICE.

See BASTARDY. BRIBERY. FALSE PRETENSES. HOMICIDE. RAPE.

Jurisdiction in criminal cases. See JUSTICES' COURTS, 1, 2.

Arrest and examination: Complaint.

1. The formal written complaint under sec. 4776, Stats. 1898 (relating to the arrest and examination of offenders), may be upon information and belief, even when the offense charged therein is a felony. *Murphy v. State*, 635

Information. See FALSE PRETENSES, 4. CRIMINAL LAW, 12, 13.

Insanity as a defense. See CRIMINAL LAW, 5, 7, 9, 14.

Evidence. See BASTARDY, 3. FALSE PRETENSES, 2. HOMICIDE, 1–6. RAPE.

Same: Rebuttal: Discretion.

2. Where evidence offered as rebuttal is not strictly such, being upon a subject fully gone into in the evidence in chief, its admission or exclusion rests largely in the discretion of the trial court, and the judgment will be reversed only for abuse of such discretion. *Steward v. State*, 623

Same: Proceedings before grand jury.

3. Testimony of grand jurors and of the district attorney as to statements made before the grand jury, and the minutes of the grand jury's proceedings, are admissible as original evidence upon a subsequent trial in court, if not objectionable under the ordinary rules of evidence, whenever the court deems it necessary for the ascertainment of truth and in furtherance of justice; and especially is a defendant entitled to introduce such evidence for the purpose of sustaining a claim (under sec. 4078, Stats. 1898, as amended by ch. 85, Laws of 1901) to immunity from the prosecution because of his having testified before the grand jury concerning the matter for which he is being prosecuted. *Murphy v. State*, 635

4. The statutes (secs. 2553–2555, Stats. 1898) do not abrogate the common-law rules as to the competency of the evidence above mentioned. *Ibid.*

Same: Insanity.

5. Evidence of acts and symptoms *held* sufficient to sustain a verdict of insanity. *Chafin Will Case*, 32 Wis. 557, distinguished. *Steward v. State*, 623

Insanity at time of trial: Inquisition.

6. Under sec. 4700, Stats. 1898, it is the duty of the trial court, at any stage of the proceedings, upon proper application, if informed that there is a probability that defendant is then insane, to make inquisition and determine that question before another step is taken in the trial, even though delay and embarrassment in the regular proceedings of the court should thereby result. *Steward v. State*, 623

7. The verdict of the jury on the special issue, that defendant was sane at the time of the alleged offense, is not a determination of his sanity at the time of the trial. *Ibid.*

8. Denial of inquisition as to defendant's sanity at the time of the trial upon the ground that the application therefor came too late is not a determination that he is sane at that time. *Ibid.*

Instructions to jury. See BASTARDY, 2, 3. FALSE PRETENSES, 3. HOMICIDE, 7–9, 11–13.

Same: Insanity: Invading province of jury.

9. An instruction, in a criminal case, that the jury should not find defendant insane on the ground alone that he had been in the habit of telling exaggerated stories, or had manifested symptoms of melancholy, moroseness, mental exaltation or depression, or for any mere eccentricity or peculiarity, was an invasion of the province of the jury; and the error was not cured by the statement that such acts and symptoms might be taken into consideration in determining the question of insanity. *Steward v. State*, 623

Same: Requests covered by general charge.

10. Refusal to give requested instructions is not error where the general charge sufficiently and properly covers the points embraced in them and correctly informs the jury of the rules of law applicable thereto. *Murphy v. State*, 635

Same: Uncorroborated testimony of accomplices: Discretion.

11. Refusal to instruct the jury that they would not be warranted in convicting defendant, because the evidence relied on to establish guilt is the uncorroborated testimony of accomplices in crime, is *held* in this case not to have been an abuse of discretion, the testimony being amply sufficient to sustain the verdict of guilty. *Ibid.*

Verdict: Sufficiency: General verdict on several counts.

12. Upon an information charging in one count both rape and assault with intent to rape, a verdict of "guilty as charged" is not uncertain, the charge of assault with intent to rape being mere surplusage, since it is necessarily included in the charge of rape. *James v. State*, 130

13. A general verdict of guilty will be ascribed to the good counts in an information, where there is nothing in the instructions

or otherwise to indicate that it was addressed to bad counts. *Bates v. State,* 612

Same: Insanity: Form.

14. Sec. 4697, Stats. 1898, does not prescribe the form of verdict upon the special issue of insanity, but only requires that the question of insanity or reasonable doubt of sanity shall be submitted in some form. Refusal to submit a form of verdict, requested by defendant, that there was reasonable doubt of his sanity at the time of the alleged offense and that he was not guilty for that reason, was not error, where the jury were properly instructed as to the burden of proof and as to reasonable doubt of sanity, and one of the forms submitted to them was in effect the same as that requested. *Steward v. State,* 623

CROSS-EXAMINATION. See FISH AND GAME, 3, 4. MASTER AND SERVANT, 2.

CUMULATIVE BOND. See GUARDIAN AND WARD.

CURING ERRORS. See APPEAL, 10, 11. CRIMINAL LAW, 9.

DAMAGES.

For breach of contract: Partial and substantial performance. See CONTRACTS, 3–13.

That partial performance of a contract involving the incorporation of the labor and material of the contractor into the property of another so that the former situation cannot be restored, but failing to accomplish substantial performance, renders such other liable to the contractor to the amount of such other's enrichment to the contractor's loss, is not a part of our judicial system. *Manning v. School District,* 84

Instead of specific performance: Election. See SPECIFIC PERFORMANCE.

For wrongful act in declaring policy forfeited. See INSURANCE, 6.

For trespass: Mitigation. See ADJOINING LANDOWNERS, 2.

For conversion: Offer to return. See CONVERSION, 3.

DEATH.

Where, in an action for death negligently caused, the complaint stated fully all the facts constituting a cause of action under secs. 4255, 4256, Stats. 1898, in favor of the surviving widow, it was proper to treat as surplusage a statement at the close that by reason of the death of the intestate "*his estate* was damaged," etc. *Lounsbury v. Davis,* 432

DEATH OF PARTY. See ABATEMENT AND REVIVAL.

DEBTOR AND CREDITOR. See ASSIGNMENT. COUNTIES, 5, 6. GARNISHMENT. JUDGMENT, 2. PARTNERSHIP, 1–6.

DECEIT. See FRAUD.

DECLARATIONS. See EVIDENCE, 1, 3.

DEEDS.

Requisites and validity: Form of tax deed. See TAX TITLES, 4–7.

Deed and defeasance, when a mortgage. See MORTGAGES, 1.

Description of land. See ADVERSE POSSESSION. REFORMATION.

Conditions subsequent: Covenant to pay taxes, etc.

1. Conditions subsequent, especially when relied upon to work a forfeiture, must be created by express terms or clear implication, and are strictly construed. *Burgson v. Jacobson,* 295
2. In consideration, among other things, of natural affection and to avoid the expense of a will, a father conveyed land to his daughter, reserving a life estate with right of possession, and the daughter covenanted to pay all taxes. Upon her failure to pay taxes the land was sold therefor, and the father, to protect himself, purchased the tax certificates. *Held,* that the agreement to pay taxes would not be considered a condition subsequent for breach of which the father could re-enter and have the conveyance rescinded. *Ibid.*

Mistake: Reformation. See REFORMATION.

3. The daughter having offered to pay all the taxes with interest, before bringing an action to reform the conveyance as to a mistake in the description of the land, came into court in such action with clean hands, and the conveyance, not being a voluntary one but supported by a valuable consideration, might be reformed. *Ibid.*

Construction: Parol evidence.

4. Parol evidence is not admissible to explain or vary the terms of a conveyance of land. *Kruse v. Koelzer,* 536
5. Evidence of the acts of the parties is not admissible to show a practical contruction of a deed, where its terms are not ambiguous or indefinite. *Ibid.*

DEFERRED-DIVIDEND POLICIES. See INSURANCE, 1, 2.

DEFINITIONS. See WORDS AND PHRASES.

DELAY. See ABATEMENT. BANKS, 3. PARTNERSHIP, 9.

DELINQUENT TAXES. See TAXATION, 12–18.

DEMAND. See TAXATION, 18.

DEMURRER. See PARTNERSHIP, 7, 9, 13. PLEADING, 1–4.

DEPOSITIONS.

See TAXATION, 8, 9.

Sec. 1061, Stats. 1898, relating to the manner of making proof before a board of review, must be considered as making an exception to the general statute (sec. 4086) as to depositions. *State ex rel. deForest v. Hobe,* 8

DESCENT AND DISTRIBUTION. See PARTNERSHIP, 7–13.

DESCRIPTION OF LAND. See ADVERSE POSSESSION. DEEDS, 3. EJECTMENT. REFORMATION.

DISCRETION. See ABATEMENT, 2. ACTION, 10. APPEAL, 4. CRIMINAL LAW, 2, 3, 11. FISH AND GAME, 4. JUDGMENT, 3. JURY, 9. NEW TRIAL.

DISMISSAL.
Of appeal. See APPEAL, 4, 7, 12. COUNTIES, 4.
Of condemnation proceedings. See RAILROADS, 6.

DISTRICT ATTORNEY. See CRIMINAL LAW, 3, 4. FISH AND GAME, 2. MALICIOUS PROSECUTION.

DIVISION of towns: Apportionment of indebtedness. See TOWNS.

DIVISION FENCES. See ADVERSE POSSESSION.

DOUBLE TAXATION. See TAXATION, 1.

EASEMENTS. See ADJOINING LANDOWNERS, 3.

EJECTMENT.

The description of land in a complaint in ejectment is sufficient if, by the aid of a surveyor and persons knowing the monuments and boundaries mentioned, the land can be found. A description designating the south boundary of the tract in question as the north boundary of one B.'s land is *held* sufficient, where the evidence and the finding of the court definitely established the exact location of such boundary. *Off v. Heinrichs*, 440

ELECTION between remedies: Damages or specific performance. See ABATEMENT, 2. SPECIFIC PERFORMANCE.

ELECTORS: Submission of questions to. See MUNICIPAL CORPORATIONS, 1. STREET RAILWAYS.

EMANCIPATION of minors. See INFANTS. MASTER AND SERVANT, 6.

EMINENT DOMAIN. See MUNICIPAL CORPORATIONS, 4. RAILROADS, 3–8.

EMPLOYER'S LIABILITY. See MASTER AND SERVANT. RAILROADS, 14.

EQUITABLE LIENS. See ASSIGNMENT.

EQUITY. See ABATEMENT. ACTION, 7, 8. ADJOINING LANDOWNERS, 1. ASSIGNMENT. COURTS, 1. DEEDS, 2, 3. GUARANTY. JUDGMENT. MONEY HAD AND RECEIVED. MORTGAGES. MUNICIPAL CORPORATIONS, 16. PARTNERSHIP, 5–13. REFORMATION. SPECIFIC PERFORMANCE.

ESTATES OF DECEDENTS. See ABATEMENT. COURTS, 1. DEATH. EXECUTORS. FRAUD. PARTNERSHIP, 7–13. SPECIFIC PERFORMANCE, 2. WILLS.

ESTOPPEL. See LIMITATION OF ACTIONS, 2. TAXATION, 4. TAX TITLES, 1, 2.

EVIDENCE.

See CRIMINAL LAW, 2–5. DEPOSITIONS. WITNESSES.

Presumptions and burden of proof. See FISH AND GAME, 7. HUSBAND AND WIFE, 3. RAILROADS, 11. TAXATION, 3, 6.

Relevancy, materiality, and competency. See CRIMINAL LAW, 3, 4. FALSE PRETENSES, 2. FISH AND GAME, 3–5. GUARANTY, 1, 2. HOMICIDE, 3, 6. MALICIOUS PROSECUTION, 2. MASTER AND SERVANT, 1–4, 17, 18. PARTNERSHIP, 2, 3. RAPE, 3. REFORMATION, 4.

1. The report of an expert to the one employing him, though communicated to the opposite party, is not admissible as evidence in favor of the employer. *Manning v. School District*, 84

2. If a person can testify to a matter by reference to a memorandum, made by him at or about the time of the occurrence and remembered by him to have been then known to be correctly made, he may do so, though at the time of testifying he cannot, by reference to the memorandum, recall such matter to mind so as to testify from present remembrance; and the memorandum itself may also be properly received as a part of his evidence. *Ibid.*

Same: Res gestæ. See RAILROADS, 13.

Demonstrative evidence. See RAILROADS, 3, 4.

Admissions and declarations. See EVIDENCE, 1.

3. Statements of an employee as to the character of his principal's work, not made while he is authorized to represent the principal in respect thereto, are not proper evidence against such principal. *Manning v. School District,* 84

4. Evidence of casual statements or admissions of a party, made in casual conversations to disinterested persons, is regarded in law as the weakest kind of evidence. *Grotjan v. Rice,* 253

Confessions. See RAPE, 2.

Documentary evidence. See RAILROADS, 3, 4.

Parol evidence affecting writings. See DEEDS, 4, 5. SALES, 2.

Opinion evidence. See EVIDENCE, 1. MASTER AND SERVANT, 17. PARTNERSHIP, 3. WITNESSES, 1.

5. It is error to strike out opinion evidence of an expert at the close of a case on the side offering such evidence, upon the ground that the detail facts upon which it was based were not given, no effort having been made by cross-examination to elicit testimony in that regard, and especially is that so where no objection is made because of such want of detail. *Manning v. School District,* 84

6. Questions, asked of medical experts, as to whether or not injuries to plaintiff's skull and to one of his eyes were *likely* to result in recurrent troubles, or were *apt* to affect injuriously the other eye, were not improper as being conjectural. *Faber v. C. Reiss Coal Co.* 554

7. In an action against a town for injuries to a traction engine which ran off the roadway and down a bank, the question whether plaintiff's employee was negligent in steering the engine being one of the ultimate questions for the jury to determine, it was error to permit plaintiff to testify that in his opinion the employee had the necessary knowledge and ability to safely steer a traction engine. *Johnson v. Highland,* 597

Weight and sufficiency. See CRIMINAL LAW, 5. FISH AND GAME, 6, 7. HOMICIDE, 4, 5. TAXATION, 7, 10, 11.

EXCEPTIONS AND BILL OF EXCEPTIONS. See APPEAL, 5, 6. JURY, 11.

EXECUTION. See CONVERSION. COUNTIES, 5.

EXECUTORS AND ADMINISTRATORS.

See ABATEMENT. COURTS, 1. DEATH. FRAUD. PARTNERSHIP, 7–13. SPECIFIC PERFORMANCE, 2. WILLS.

Where an administrator was duly authorized, under secs. 3811, 3813, Stats. 1898, to bring an action to recover assets alleged to be a part of the estate of his decedent, and a judgment was recovered against him therein for costs and disbursements, such costs and disbursements were a part of the necessary expenses of administration, within the meaning of sec. 3852, payable out of the assets of the estate, with priority over general debts of the decedent. *Ferguson v. Woods,* 544

EXEMPTIONS from taxation. See TAXATION, 2–4.

EXPERT TESTIMONY. See EVIDENCE, 5–7. MASTER AND SERVANT, 17. WITNESSES, 1.

FALSE PRETENSES.

1. Defendant, by means of false pretenses, obtained a loan of moneys. No part thereof was paid directly to him, but upon his request that the moneys be sent to two persons designated by him the lender's agent bought bank drafts and mailed them to such persons. These transactions took place in this state, in the county in which the venue was laid. Upon one of said drafts the person to whom it was sent, a creditor of defendant, obtained the money in Iowa. There was no evidence as to what became of the other draft. *Held*, that these facts did not warrant a conviction under an information charging the obtaining of money by false pretenses in said county. MARSHALL, J., dissents. *Bates v. State*, 612

2. In a prosecution for obtaining money by false pretenses, defendant's representations as to the value of his land upon which he obtained a loan were immaterial as being mere expressions of opinion, but his statements of specific facts as to what he paid for the land were material, although their effect was merely to convince the lender of the value of the land. *Ibid.*

3. An additional instruction to the jury, given after they had once retired, to the effect that if they found any one of the alleged false pretenses, that would suffice, with the qualifications given in the original charge, is *held* not erroneous as omitting the qualification, previously given, that the misrepresentation must have been material. *Ibid.*

4. A count in an information for obtaining money by false pretenses charging that the money was obtained from H. P. P. & Son is bad, in that it fails to specify any person from whom the money was obtained. *Ibid.*

FALSE REPRESENTATIONS. See FRAUD.

FEES: Claim against county. See COUNTIES, 2–4.

FELLOW-SERVANTS. See MASTER AND SERVANT, 8–10. RAILROADS, 14.

FENCES. See ADVERSE POSSESSION.

FINES. See JUSTICES' COURTS, 3.

FIRES negligently set. See NEGLIGENCE, 5–7.

FISH AND GAME.

1. The state has the right to enact reasonable police regulations to preserve for its people the fish and game within its limits. It may prohibit the shipment or sale of more than a given quantity within a given time by any one person; and such a prohibition is not an unconstitutional infringement upon private property rights. *State v. Nergaard*, 414

2. Under sec. 1498*g*, Stats. 1898, making it the duty of district attorneys to prosecute actions for violation of the fish and game laws when complaint is made by the state warden or any deputy, the complaint in an action in justice's court to recover a forfeiture for such a violation, if it appears on its face to be made by one of the officers named, need not state that it is made on behalf of the state, notwithstanding the general provisions of sec. 3602 in that regard. *Ibid.*

3. In an action to recover a forfeiture for a violation of the fish laws, it was not a prejudicial error to permit defendant, on his cross-

examination, to be asked as to a prior arrest for a similar offense, where in answering the question he voluntarily stated that he had been convicted of such offense. *Ibid.*

4. It was not error nor an abuse of discretion in such a case to compel defendant, on his cross-examination, to answer the question whether he was not constantly under surveillance of the officers of the law while in business as a fish dealer at another place, and whether they did not frequently take fish from his possession. *Ibid.*

5. The question being whether certain pike, which had been shipped to defendant from O. on Lake W., had been taken from that lake, testimony of game wardens having jurisdiction in that vicinity that at about the time of the shipment pike were caught in large quantities in said lake, more than sufficient to satisfy the local demand, and that they knew of none being shipped in from other points, was admissible. *Ibid.*

6. Testimony of a witness that she knew the kind of pike taken from Lake W., and that those in question were not the same kind of fish, but were much larger, was sufficient to render improper an instruction that it appeared by the undisputed evidence that the pike in question were taken from said lake. *Ibid.*

7. Sec. 23, ch. 358, Laws of 1901 (providing, in effect, that shipments of fish from inland points in the state shall come under the provisions of law pertaining to shipment of fish taken from the inland waters of the state), has no application to a case where the shipment complained of was from a city situated upon the outlying waters of the state, although the fish had previously been shipped to that city from an inland point. In such a case, therefore, the fact that the fish had originally been shipped from an inland point did not raise a conclusive presumption that they had been taken from inland waters. *Ibid.*

8. Under secs. 3294, 3295, Stats. 1898, in a civil action to recover a forfeiture for a violation of the fish and game laws which is not a misdemeanor, the state need not establish its case beyond a reasonable doubt, but only by a preponderance of the evidence. *Ibid.*

FORECLOSURE.
Of lien. See JUDGMENT, 3.
Of mortgage. See LIMITATION OF ACTIONS, 3.

FOREIGN CORPORATIONS. See COMMERCE. INSURANCE, 1, 2. JUDGMENT, 1.

FOREIGN STATUTES. See INSURANCE, 1.

FORFEITURE of insurance policy. See INSURANCE, 5, 6.

FORFEITURES. See FISH AND GAME. JUSTICES' COURTS, 3.

FRANCHISES: Submission to vote of electors. See MUNICIPAL CORPORATIONS, 1. STREET RAILWAYS.

FRAUD.

See BROKERS, 1-3. JUDGMENT, 2. TAX TITLES, 1, 2.

1. The sending to an administrator of notices of assessments upon the so-called "stock" representing his decedent's interest in a mining option is *held* not to constitute actionable fraud or deceit which would entitle him to recover, in a tort action, the amount so paid by him. *Miles v. Pike Mining Co.* 278

2. Assuming that an administrator may sue to recover back property unlawfully diverted from the estate, even though he knowingly participated in the unlawful act, and assuming that the application of moneys of an estate to a known unlawful purpose by persons to whom such moneys were paid by the administrator might constitute such conversion as to warrant an action in tort for damages, yet where, among the assets of an estate, was an interest in a mine which was expected to require, from time to time, advances for protection or enhancement of its value, payments made in good faith by the administrator for that purpose, and so received and applied by those in charge of the mine, do not warrant any inference of fraud or wrongful intent, and—especially where there is nothing to show that the value of the property has not been enhanced to the full amount of the payments—do not give the administrator any right to recover damages in a tort action against those who received the moneys. *Ibid.*

FRAUDS, STATUTE OF.

Plaintiff contracted with a corporation to cut and haul logs from his lands, it being understood that as the subcontractors needed supplies and money for the work plaintiff would make advances to them, to be deducted from the amounts becoming due from him to the principal contractor. Afterwards plaintiff sold much of the timber to defendant and assigned to it the logging contract so far as it affected the timber sold. This sale was in part tentative and dependent upon the result of investigation of titles, etc. For certain necessary advances to be made by plaintiff pending such investigation defendant orally agreed to reimburse him. *Held*, that this was not a promise to answer for a debt of the subcontractor to whom such advances were made, but was an original promise to repay sums of which defendant received the benefit, and hence was not within the statute of frauds. *McCord v. Edward Hines L. Co.* 509

FRAUDULENT CONVEYANCES. See GARNISHMENT.

GAME LAWS. See FISH AND GAME.

GARNISHMENT

See ASSIGNMENT.

1. A note and mortgage were assigned by husband to wife in fraud of creditors and were by the wife placed in a bank for collection. After it had received a check from the mortgagor in payment, the bank was garnished by a creditor of the husband and had notice of the plaintiff's claim that the assignment to the wife was void. It nevertheless paid the money to the wife, who had also been made a garnishee. *Held*, that under sec. 2768, Stats. 1898, the bank was liable as garnishee. *Eau Claire Nat. Bank v. Chippewa Valley Bank*, 520

2. Although the bank and the wife of the principal defendant were proceeded against severally as garnishees, yet all were parties to the proceeding, so that no interpleader was necessary, and a judgment in favor of the plaintiff against the bank as garnishee, and also determining that the wife had no title to the note and mortgage, was proper. *Ibid.*

3. Under sec. 2768, Stats. 1898, the bank was liable in such case for interest on the amount found to have been in its possession as garnishee, from the date of the judgment in favor of plaintiff in the original action. *Ibid.*

4. The bank having denied all liability, costs were properly awarded against it, under sec. 2772, Stats. 1898. *Ibid.*

GOOD FAITH: Intention to build road. See RAILROADS, 4.

GRAND JURY: Evidence of proceedings. See CRIMINAL LAW, 3, 4.

GUARANTY.

1. Permitting defendant to testify generally that she did not receive any consideration for signing the guaranty in suit, if error, was not prejudicial where, without objection, she denied specifically the existence of the agreement which constituted the only consideration claimed. *Peck v. Peck,* 550

2. The question being whether a residuary legatee guaranteed payment of the principal of a note of the testator in consideration of the payee's agreement not to present the note as a claim against the estate, evidence that the testator left no estate from which the note could be paid, and that the legatee knew that fact before the making of the alleged guaranty, was admissible. *Ibid.*

3. The question whether defendant, by payments, had ratified a change made in the contract of guaranty after she signed the same, was not a proper question for a special verdict, since the ratification, if any, would be merely evidentiary, bearing on the question whether the agreement relied upon as the consideration to support the guaranty was made. *Ibid.*

4. Plaintiff testified that at a time when only he and defendant were present the guaranty "was written and signed by" defendant. It was a conceded fact that the guaranty itself, above defendant's signature, was not in her handwriting. *Held,* that it was not prejudicial error for the court, in charging the jury, to state that plaintiff testified that he wrote the guaranty. *Ibid.*

GUARDIAN AND WARD.

1. Pursuant to an order of the county court the guardian of an incompetent person gave a new bond, and on the same day filed an account. Thereupon the court made an order reciting that the new bond was to take the place of the one theretofore given, allowing the account, and directing that the old bond be satisfied and the sureties and principal be released from further liability thereon. Notice was not given as provided for in sec. 3967, Stats. 1898, nor was there any examination of the account as prescribed in sec. 3972, nor any compliance with sec. 4281*b*. *Held,* that the release was ineffective and that the new bond was merely cumulative. *Brehm v. U. S. F. & G. Co.* 339

2. The sureties on such new bond were liable, in accordance with its terms, for a breach thereof by failure of the guardian to settle his account at the expiration of his trust and to "pay and deliver all the property, real and personal, remaining in his hands, or due from him on such settlement,"—even though, before such bond was given, the guardian had converted moneys of the estate to his own use and had given himself false credits of equal

amount in the account filed and approved when the new bond was given. *Ibid.*

3. The attempt of a guardian to loan funds of his ward to himself, and the giving of his note therefor, cannot be considered an investment of the trust funds or lessen his liability to account therefor as guardian. *Ibid.*

HARMLESS ERROR. See APPEAL, *Affirmance and reversal.*

HEALTH.

See JUSTICES' COURTS, 2.

1. Under sec. 1412, Stats. 1898, a health officer has no power, without the approval of the board of health, to take measures for the prevention, suppression, and control of a contagious disease. He cannot, without such approval, bind the town by the employment of a physician to attend a person afflicted with such a disease. *Collier v. Scott,* 400

2. Sec. 1416, Stats. 1898, relates to the duties of the board of health; and the health officer cannot exercise the powers there conferred, without the approval of the board. *Ibid.*

[3. Whether the board of health has any power to charge the town with the expense of medical services and medicine furnished to a person infected with smallpox, especially when such person is not a pauper, but able to pay such expense, not determined.] *Ibid.*

HIGHWAYS AND BRIDGES.

Power of county as to repairs: Town-line roads: Bridges.

1. Sec. 1311, Stats. 1898, authorizing counties to repair state or county roads under certain circumstances, has no application to other roads. *State ex rel. Shawano Co. v. Sexton,* 352

2. A road which had become a public highway by user and working was situated as near the town line as the nature of the ground would permit and, together with a bridge thereon, had been kept in repair by the adjacent towns jointly for a number of years. In a proceeding to compel one of the towns to collect by tax a portion of the expense incurred by the county in rebuilding such bridge, allegations of the above facts are *held* sufficient to show that the repair and maintenance of the bridge devolved upon said towns, without an allegation that the requisite steps were taken under secs. 1272, 1273, Stats. 1898, to lay out the highway as a town-line road. *Ibid.*

3. To give a county jurisdiction, under sec. 1319, Stats. 1898, to aid towns in the repair and construction of bridges, the conditions prescribed by that section must be fulfilled by the towns; and where two towns are jointly liable for the maintenance of a bridge, *it seems* that their concurrent action is necessary to give the county jurisdiction. *Ibid.*

Same: Charging cost to town.

4. In order that a county may charge a town, under sec. 1338, Stats. 1898, with the cost of repairing a bridge, there must be a compliance with the essential requirements of that section; and in a *mandamus* proceeding to compel the town to insert the claim in the tax roll the petition of the county should show what the

decision was from which an appeal was taken by the freeholders; what steps were taken to perfect the appeal; that the committee of the county board made the required examination and determination as to repairs; that the chairman of the board caused the repairs to be made; and, where two towns were chargeable with the cost of the repairs under sec. 1273, Stats. 1898, that such cost had been apportioned between them as provided in that section. *Ibid.*

Duty of town: Width of roadway: Injury to traveler on footpath.

5. Towns are not required to keep country roads in suitable condition for travel for their whole width, nor to build sidewalks thereon. *Hammacher v. New Berlin,* 249

6. One who, while walking at night in a footpath, not prepared for public travel, beside a country road with which he was familiar, failed to follow such path into the traveled roadway and over a culvert, and so walked into a ditch and was injured, cannot recover from the town for such injury. *Ibid.*

7. The absence of any railing or guard to prevent a traveler on the prepared roadway from falling off the end of the culvert, is immaterial in such a case, since such a railing would not have prevented the accident. *Ibid.*

Same: Injury to traction engine.

8. It is the duty of a town to construct and maintain its highways so that they will be reasonably safe for public travel by traction engines such as are in use in that part of the country. *Johnson v. Highland,* 597

9. In an action against a town for injuries to a traction engine, alleged to have been caused by defects in a highway, the question as to the insufficiency of the highway, and the question of contributory negligence on the part of plaintiff or his employee who was steering the engine, are *held* to have been for the jury. *Ibid.*

HOMESTEAD. See JUDGMENT, 3.

HOMICIDE.

Manslaughter: Degrees: Evidence.

1. The evidence in this case is *held* sufficient to sustain the conviction of the defendants of manslaughter in the third degree:—of one under either sec. 4354 or sec. 4355, Stats. 1898, and of the other under sec. 4355. *Kenney v. State,* 486

2. A conviction of manslaughter in the fourth degree under either sec. 4362 or sec. 4363, Stats. 1898, is *held* to have been warranted by evidence from which the jury might have concluded either that the pistol, by the accidental discharge of which the homicide was committed, was unlawfully pointed by defendant at the deceased, or that it was lawfully so pointed but the discharge thereof was the result of culpable negligence. *Schmidt v. State,* 516

Assault with intent to kill: Evidence.

3. As to whether the purpose of a person who has shot another was to take that other's life, proof that had the bullet spent its force in the direction it was discharged the result would probably have been such other's death, is competent. *Ullman v. State,* 602

4. Proof that a person assaulted another with a deadly weapon in such a way that had the effect of the assault not been turned aside by some means not reasonably to have been expected by such person, the natural and probable result would have been the death of such other, is sufficient to warrant a finding that the intention of such person in making such assault was to take such other's life. *Ibid.*

Same: Instructions to jury: Self-defense.

5. Upon the evidence in this case (sufficiently stated in the opinion) it is *held* that the jury were warranted in finding that the shooting of a person by defendant was with intent to murder, and not in lawful self-defense. *Holmes v. State,* 133

6. On a trial for assault with intent to murder, there being evidence that defendant harbored ill will not only against the person assaulted but also against the other employees of the same establishment, evidence of threats made by defendant against any of them, even as long as nine months before the assault, was admissible to show his purpose in visiting such establishment, armed with a revolver, at the time of the assault. *Ibid.*

7. The jury were charged that, in order to convict, they must find, first, that defendant assaulted the person named, second, that defendant was armed with a dangerous weapon, and, third, that the assault was made with intent to murder said person; but were told that as to the first and second elements of the crime there was no dispute, defendant having admitted that he shot said person with a revolver. *Held,* that this could not have misled the jury to understand that a criminal assault was admitted or undisputed, especially as they were afterwards carefully instructed on the subject of unlawful assault as something distinct from the assault as to which there was no dispute. *Ibid.*

8. Although the court had not yet instructed the jury on the subject of justification for the shooting, an instruction that if they found defendant guilty "under the instructions so far given" they should return a verdict accordingly, was not error, where the jury had just been told that they should find defendant guilty unless they found the shooting "was justifiable under the rules which will hereafter be given to you by the court," and proper instructions were thereafter given on that subject. *Ibid.*

9. It was not error for the court to state to the jury that the prosecution "claims there is some evidence tending to prove" certain facts, and to instruct the jury in respect thereto, where there was in fact a basis in the evidence for such claim. *Ibid.*

10. The mere occurrence of a previous affray in which defendant had been ejected from a building did not justify his shooting of one of his assailants after he was entirely free from them. *Ibid.*

11. An instruction that the taking of human life "cannot be justified on some slight appearance of danger. Nothing short of actual pressing necessity to the apprehension of the defendant will justify the taking of human life in self-defense," was faulty in that it was not qualified to the effect that one may kill his assailant if he believes and has reasonable ground to believe that he is in imminent danger of receiving some great personal injury at the hand of such assailant. *Ibid.*

12. The omission, however, to explain to the jury what constitutes a "pressing necessity" was not error, in the absence of any re-

quest by defendant for such explanation; and the omission of the requirement of a reasonable ground for belief in such necessity, was favorable to defendant and therefore not an error which should work reversal. *Ibid.*

13. One assaulted is entitled to act upon his apprehensions of imminent peril, reasonably justified by the circumstances, not only in deciding to use force to repel the assault but also in deciding as to the amount of force to be used; and it was error to charge the jury, in such a case, that the assaulted person had a right to use no greater force than was "actually necessary under all the circumstances." *Schmidt v. State,* . 516

HUSBAND AND WIFE.

See GARNISHMENT. INSURANCE, 3–6. JUDGMENT, 3. WITNESSES, 2.

1. Upon the evidence in this case (stated in the opinion) it is *held* to have been a question for the jury whether defendant's wife was living separate and apart from him without his consent and without cause when the services in question were rendered to her. *Morgenroth v. Spencer,* 564
2. Where a wife is living separate and apart from her husband without cause and without his consent, he is not liable for the services of a physician employed by her if he did not authorize such employment. *Ibid.*
3. One who furnishes necessaries to a wife living separate and apart from her husband has the burden of showing that she is justifiably so living. *Ibid.*

IMMUNITY from prosecution. See CRIMINAL LAW, 3.

IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 2–16.

INCOMPETENT PERSONS. See GUARDIAN AND WARD.

INDEFINITENESS. See PLEADING, 1, 3.

INDICTMENT AND INFORMATION. See CRIMINAL LAW, 12, 13. FALSE PRETENSES, 4.

INFANTS.

See MASTER AND SERVANT, 1–6.

Whether a minor has been emancipated or not may be shown by an express agreement or by circumstantial evidence. *Grotjan v. Rice,* 253

INFECTIOUS DISEASES. See HEALTH.

INFORMATION. See CRIMINAL LAW, 12, 13. FALSE PRETENSES, 4.

INJUNCTION. See ADJOINING LANDOWNERS.

INQUISITION as to sanity. See CRIMINAL LAW, 6–8.

INSANE PERSONS. See GUARDIAN AND WARD.

INSANITY. See CRIMINAL LAW, 5–9, 14.

INSTRUCTIONS TO JURY. See APPEAL, 5, 6, 10, 11. BASTARDY, 2, 3. CONTRACTS, 1, 4. CRIMINAL LAW, 9–11. FALSE PRETENSES, 3. GUARANTY, 4. HOMICIDE, 7–13. MASTER AND SERVANT, 5–7, 15, 16. NEGLIGENCE, 3–7. TRIAL, 1, 2.

INSURANCE.

Life insurance: Distribution of surplus: Periods: Statutes construed.

1. Under secs. 87 and 83 of the insurance laws of New York (ch. 118, Gen. Laws N. Y. 1868, and ch. 100, Gen. Laws N. Y. 1872) an insurance corporation of that state has authority to issue deferred-dividend policies by the terms of which accumulated surplus is not to be distributed except in periods longer than five years. *Equitable L. A. Soc. v. Host,* 657

2. Sec. 1952, Stats. 1898 (providing that mutual life insurance corporations *may* distribute their surplus annually, or once in two, three, four, or five years as the directors may determine, and that in determining the amount of surplus to be distributed there *shall* be reserved an amount not less than the aggregate net value of all the outstanding policies, etc.), does not require the distribution to be made at least once in every five years. That the word "may" was intended to be permissive only is shown by the use of the mandatory word "shall" in the same section with reference to the amount to be reserved, and also by the history of the section and by the practical construction given to it by all parties concerned for more than thirty years after its enactment as sec. 14, ch. 59, Laws of 1870. *Ibid.*

Same: Beneficiary interest of married woman: Assignment.

3. Where a husband procured a policy of insurance on his own life for the benefit of his wife, payable on his death to her "or her executors, administrators, or assigns," the statutes of this state as they existed prior to the enactment of sec. 1, ch. 396, Laws of 1891,—substantially as in sec. 2347, R. S. 1878,—did not preclude the husband and wife together from assigning the policy with the consent of the insurance company. *Canterbury v. N. W. Mut. L. Ins. Co.* 169

4. Sec. 1, ch. 396, Laws of 1891 (providing that every such policy "shall be the sole and separate property" of the wife and shall inure to her separate use and benefit and that of her children, and, in case of her surviving the term of the policy, the amount of the insurance shall be payable to her for her own use and benefit, "free from the control, disposition, or claims of her husband" or his representatives or creditors), assuming it to be applicable, as therein provided, to policies issued before its enactment, did not impair the assignability of such policies. A declaration in *Ellison v. Straw,* 116 Wis. 207, to the effect that, under said act (embodied in sec. 2347, Stats. 1898), a married woman had no right to assign her interest in a policy of insurance on the life of another, is withdrawn. MARSHALL and SIEBECKER, JJ., concur as to the assignability of policies issued before the act of 1891 and therefore governed by the prior law, but are of the opinion that policies for the benefit of married women, issued subsequent to and governed by the act of 1891, are not assignable. *Ibid.*

Same: Wrongfully declared forfeiture: Damages.

5. Where, under sec. 2347, Stats. 1898, and the terms of the policy, insurance on a husband's life was to go to his wife as her separate property if she survived him, otherwise to his heirs, neither the husband nor his heirs are necessary parties to an action by the wife against the insurance company for damages, based on the wrongful act of the company in declaring the policy forfeited. *Merrick v. N. W. Nat. L. Ins. Co.* 221

6. The wife has a cause of action in such a case against the insurance company, although the husband is still living; and the measure of her damages is the value of the policy at the time it was so declared forfeited. *Ibid.*

Same: Benefit associations: Who may be beneficiaries.

7. The grant of power, in ch. 101, Laws of 1899, to any member of a benefit association to name as his beneficiary any person designated by the laws of the association, is a limitation upon the right. *Grand Lodge, Hermann's Sons v. Lemke,* 483

8. Where the laws of a benefit association limit beneficiary rights to "survivors" of the member, that term does not include one who was neither a relative of the deceased, nor a member of his household, nor connected with him by marriage. *Ibid.*

INTENT. See HOMICIDE, 3-6. REFORMATION, 1, 2. TAXATION, 5-7.

INTEREST. See GARNISHMENT, 3. TAXATION, 18.

INTERLOCUTORY JUDGMENTS AND ORDERS. See APPEAL, 1, 2.

INTERPLEADER. See GARNISHMENT, 2.

INTERSTATE COMMERCE. See COMMERCE.

IRRELEVANT MATTER: Striking out. See APPEAL, 3. NEGLIGENCE, 2.

JOINDER.

Of causes of action. See ACTION, 1-9.

Of parties. See COURTS, 1. GARNISHMENT, 2. INSURANCE, 5. JUDGMENT, 1, 3, 4. PARTNERSHIP, 8, 13.

JUDGMENT.

Form. Parties. See GARNISHMENT, 2.

1. In an action to restrain the commissioner of insurance from revoking the license of a life insurance company, it should not be adjudged that policies issued by the company were unlawful, where the holders of such policies are not in any way parties to the action. *Equitable L. A. Soc. v. Host,* 657

Judgment notwithstanding verdict. See TRIAL, 3.

Judgment as to costs. See BASTARDY, 4.

Judgment according to mandate of appellate court. See APPEAL, 12, 13.

Assignment of judgment.

2. A promissory note without consideration, which had not been so delivered as to become operative, was wrongfully transferred by the payee, L., to an innocent purchaser, who afterwards recovered judgment thereon against both the maker and L. The latter paid or purchased the judgment, taking a written assignment thereof. This instrument was lost and, in accordance with an agreement between L. and one R., the judgment creditor made a new assignment to R. for the purpose of transferring to him whatever interest L. had acquired in the judgment under the previous assignment. *Held:*

(1) The second assignment conveyed L.'s interest in the judgment to R., but gave him only such rights as L. had in respect thereto.

(2) L.'s conduct, in transferring the note and permitting it to go to judgment, rendered him the principal judgment debtor and primarily liable, as between himself and the maker. His payment or purchase of the judgment, therefore, satisfied and

extinguished it, notwithstanding he took an assignment, and nothing passed under the assignment to R. *Snyder v. Malone*, 114

Docketing of judgment. See COUNTIES, 6.

Vacating judgment: Rights of persons not parties.

3. In an action to foreclose a mechanic's lien upon a homestead for work done under a contract with the husband, who held the title, he was the sole defendant. He defended on the ground of failure to complete an entire contract, but was defeated on the merits. The wife, though she had full opportunity, did not ask to be made a party before the trial, but applied to have the judgment vacated that she might retry the case on the same defense. *Held* that, as the contract was with the husband alone, the wife, though a proper party, was not a necessary party to the action, and under the circumstances there was no abuse of discretion in denying her application. *Hunt v. McDonald*, 82

4. After judgment establishing the mutual rights of the parties in an action against a county to annul tax certificates on plaintiff's lands, the owner of a portion of such certificates, not being a party to the action nor seeking to be made a party nor showing that the county is a mere nominal party and he the real party in interest, has no right to have the judgment vacated on his motion. *Pier v. Oneida Co.* 398

Reversal on appeal. See APPEAL, *Affirmance and reversal.*

Conclusiveness of adjudication. See GARNISHMENT, 2. JUDGMENT, 1.

5. It having been determined by the judgment in another action between the same parties, and upon the same evidence, that the alleged agreement upon which this action is based was not made, the matter is *res judicata* and that judgment is conclusive in this action. *Arnold v. Randall*, 1

Collection of judgment against county. See COUNTIES, 5, 6.

JURISDICTION. See CERTIORARI. BRIBERY. COUNTIES, 2–4. COURTS. HIGHWAYS, 3, 4. JUSTICES' COURTS. RAILROADS, 6. TAXATION, 10–13, 16.

JURY.

Selection: Jury commissioners: Irregularities.

1. The law requiring the jury commissioners to furnish the clerk of the circuit court a list of names of persons qualified to serve as jurors to be drawn from the body of the county is satisfied if each commissioner proposes a partial list and all are adopted by the commissioners as the one list required by the statute and are delivered to the clerk of the circuit court accordingly. *Ullman v. State*, 602

2. Failure of the commissioners to authenticate the list of names furnished to the clerk as above stated, or of the clerk of the circuit court to make a list of such names and deliver the same to at least one of the commissioners, or failure of such clerk or his deputy to personally write the names upon separate slips of paper, fold and deposit the same in the box ready for drawing, such acts being performed by an employee of the clerk under his direction and in his immediate presence, are harmless irregularities, in the absence of proof by a party deeming himself aggrieved that he is actually prejudiced thereby. *Ibid.*

3. As a rule irregularities in executing a statutory method for selecting jurors are deemed immaterial, unless it appears probable that the person desiring to take advantage thereof may probably be prejudiced thereby. *Ibid.*

Examination on voir dire: Interest. See APPEAL, 11.

4. Plaintiff's counsel having suggested to the court that an insurance company was pecuniarily interested in the outcome of an action for personal injuries, it was proper to inquire of a juror, on his *voir dire*, whether or not he was a stockholder in that insurance company. *Faber v. C. Reiss Coal Co.* 554

Challenge to the array: Practice.

5. By the rules of the common law a challenge to the array is required to be made in writing stating specifically the grounds thereof. *Ullman v. State,* 602

6. The Code is a complete system for criminal as well as civil actions. While it provides no challenge to the array it does not invade the inherent power of the courts, which, by the settled practice, accords to either party to an action triable by a jury an opportunity to object to the entire panel of jurors upon any ground deemed by him to affect the validity thereof. *Ibid.*

7. An objection of the sort before mentioned may be by a formal challenge, or by a mere objection, or by a motion to quash the return, or to dismiss the jury, mere form not being material, and it may properly be, as it commonly is, denominated a challenge to the array. *Ibid.*

8. In whatever form the challenge to the array, so called, is made, the specific grounds relied on should be definitely stated, though not necessarily in writing, it being sufficient if it is made at the bar of the court and taken down by the reporter. *Ibid.*

9. How specific the grounds of a challenge to the array should be made in order to entitle the moving party to a hearing is within the discretion of the court, such discretion, however, not being broad enough to permit the grounds to be stated so generally or obscurely as not to reasonably inform the adverse party of the precise nature thereof. *Ibid.*

10. A proper objection to the entire panel of jurors should be summarily determined by the court, evidence being taken where necessary to the decision of disputed questions of fact. *Ibid.*

11. In order to entitle a person deeming himself aggrieved by a ruling on a challenge to the array to a review thereof on an appeal, exception must be duly taken thereto, and the specific objections and proceedings thereon and such exception be embodied in a bill of exceptions. *Ibid.*

12. The rule that an unsuccessful challenge to a juror is waived by failure to object to the panel collected for the trial, does not apply to a challenge to the array. *Ibid.*

JUSTICES' COURTS.

See COURTS, 2, 3. FISH AND GAME, 2.

1. The jurisdiction which, by sec. 5, ch. 218, Laws of 1899, as amended by sec. 1, ch. 70, Laws of 1901, and by ch. 388, Laws of 1903, is preserved to justices of the peace in Milwaukee county outside of the city of Milwaukee as to violations of ordinances of their

respective municipalities, extends only to those violations for which the prosecution is to be by civil action in the name of the municipality, under sec. 3294, Stats. 1898; and offenses which are misdemeanors as defined in said sec. 3294, punishable by fine or imprisonment or both in an action in the name of the state, are not within such jurisdiction. *Stoltman v. Lake,* 462

2. Thus, the violation of an ordinance or regulation of the board of health of a town in Milwaukee county, punishable only under sec. 4608, Stats. 1898, by imprisonment or by fine, is not within the jurisdiction of a justice of the peace of such town. *Ibid.*

3. The word "fine," as used in sec. 3294, Stats. 1898, does not include those forfeitures, sometimes called fines, imposed by municipal corporations for violating their ordinances. *Ibid.*

4. An appeal from the judgment of a justice of the peace who had no jurisdiction of the subject matter confers no jurisdiction upon the appellate court, and it should dismiss the case. *Ibid.*

LACHES. See ABATEMENT. BANKS, 3. PARTNERSHIP, 9.

LAND CONTRACT. See CONTRACTS, 3. SPECIFIC PERFORMANCE.

LANDLORD AND TENANT. See MORTGAGES, 2, 3.

LICENSE. See ADJOINING LANDOWNERS.

LICENSES to foreign insurance corporations. See JUDGMENT, 1.

LIENS. See ASSIGNMENT. JUDGMENT, 3. PARTNERSHIP, 4–6.

LIFE ESTATES. See WILLS.

LIFE INSURANCE. See INSURANCE.

LIMITATION OF ACTIONS.

See ABATEMENT. MUNICIPAL CORPORATIONS, 11–13. PARTNERSHIP, 10–12.

1. The provision of subd. 5, sec. 4222, Stats. 1898, that the notice of personal injuries therein mentioned "shall be given in the manner required for the service of summons in courts of record," is mandatory, and no other manner of service can be substituted. *Smith v. C., M. & St. P. R. Co.* 120

2. Letters from a railway company's claim agent to plaintiff's attorney relating to plaintiff's claim on account of personal injuries cannot be held a waiver of the notice required by subd. 5, sec. 4222, Stats. 1898, or as an estoppel to insist that such a notice was necessary, where it does not appear that such agent had any authority to waive the notice, nor that anything was said or done by him indicating or leading plaintiff to believe that no further notice would be required. *Ibid.*

3. The statute (subd. 2, sec. 4221, Stats. 1898) limiting to ten years "an action upon a sealed instrument when the cause of action accrued without this state," does not apply to an action to foreclose a mortgage of land situated in this state, although both parties reside in another state. Such an action, being merely a proceeding against land in this state, is local and not maintainable in the courts of any other state, and hence the cause of action accrues in this state and nowhere else. *Wells v. Scanlan.* 229

LOGS AND TIMBER. See FRAUDS, STATUTE OF. PARTNERSHIP, 1–3. TAXATION, 5–7, 11. WATERS.

LOST CHECK. See BANKS, 3, 4.

MAINTENANCE of bastard. See BASTARDY, 1.

MALICIOUS PROSECUTION.

1. If a criminal prosecution was commenced in good faith under the advice of counsel, particularly of the proper prosecuting officer, after a full and fair statement to him of all the facts known to the complainant or believed by him to exist, such complainant is not liable for malicious prosecution. *Brinsley v. Schulz,* 426
2. In an action for malicious prosecution it was competent for defendants to testify generally that they fully and fairly stated all the facts to the district attorney and acted upon his advice; and where this testimony was undisputed it was proper to direct a verdict in their favor. *Ibid.*

MANDAMUS. See COUNTIES, 5.

MANSLAUGHTER. See HOMICIDE, 1, 2.

MARRIED WOMEN. See GARNISHMENT. HUSBAND AND WIFE. INSURANCE, 3–6. JUDGMENT, 3. WITNESSES, 2.

MASTER AND SERVANT.

Contract of hiring: Implied contract: Minors.

1. In an action upon implied contract to recover for services of plaintiff while a minor living with defendant, the admission of evidence as to whether or not plaintiff was treated by defendant as a servant for hire was not error. The decision of the trial court as to the competency of such evidence is not to be disturbed unless manifestly wrong. *Grotjan v. Rice,* 253
2. A question, asked on cross-examination of plaintiff's father, as to whether he had not stated that he was anxious to get the boy (who wished to study medicine) to the defendant's (who was a physician), because he would learn more than he would in school, is *held* immaterial, but, it having been answered in the negative, plaintiff was not prejudiced. *Ibid.*
3. Evidence that plaintiff's father had advised him to make himself useful while at the defendant's place, as the latter did not like lazy persons, is *held* immaterial, and its admission with a suggestion that it had a bearing on the question whether plaintiff had been emancipated, was an error prejudicial to him. *Ibid.*
4. Statements by plaintiff's father to third persons as to his relations with his son, not made in the presence of either of the parties, and not properly offered to impeach the father, were incompetent. *Ibid.*
5. An instruction that if plaintiff was the owner of his own time during the period of the alleged services he was entitled to recover if the jury found he had a cause of action, otherwise not,—is *held* correct so far as it went; and the omission to explain what circumstances would give rise to a cause of action was not fatal error, in the absence of any request for such explanation. *Ibid.*

6. An instruction that if plaintiff rendered the services under a contract between his parents and the defendant, although he was emancipated prior thereto, the making of such contract effected a revocation of such emancipation and precluded him from recovering, if he had knowledge of such revocation, was erroneous. *Ibid.*

7. In an action to recover for services on implied contract, refusal of instructions applicable to the particular case and correctly stating under what circumstances defendant would be liable on such a contract, was error where nothing equivalent was given in the general charge. *Ibid.*

Injuries to servants: Death: Negligence: Fellow-servants: Assumption of risk, etc. See NEGLIGENCE, 1. RAILROADS, 14.

8. When the master has provided for the servant a safe place to work, safe tools and appliances, and competent and careful co-employees, and has given sufficient warning of hidden or latent dangers, he may commit to the employees the details of the work, including incidental repairs or readjustment of machinery which can easily be made by the employees themselves from proper materials furnished by the master; and such servants, thus prosecuting the work or making such readjustment or incidental repairs, become fellow-servants, whatever their rank, so that the negligence of one by which others are injured is the negligence of a fellow-servant. *Williams v. North Wisconsin L, Co.* 328

9. So *held* as to the negligence, if any, of the superintendent of a lumber company operating an electric light plant, in directing the current to be turned on, to test the operation of a dynamo after making a change in the armature, without notifying an employee who was engaged in splicing a wire in the street, and who was killed by the test current. *Ibid.*

10. Whether such act of the superintendent was negligence rendering him liable, and whether the deceased was guilty of contributory negligence, are *held*, on the evidence, to have been questions for the jury. *Ibid.*

11. An employee in a mill must be deemed to have assumed the risk of injury by slipping on lubricating oil which had been allowed to accumulate upon the floor near the machine at which he was working, the presence of the oil and the danger therefrom being obvious. *Yess v. Chicago Brass Co.* 406

12. It is not necessary that the proximate cause of an injury should be the immediate cause thereof, in order to warrant a recovery. *Ibid.*

13. In the operation of a machine for winding into rolls thin bars or sheets of brass, the hands of the operator were expected to come in contact with it, but it could not be stopped while in use and under tension in case his hand got caught. An inexperienced employee, set to work at this machine, was not instructed as to this danger, but was told that he could stop the machine at any time by stepping on a certain lever. While operating the machine he slipped upon some lubricating oil on the floor, causing his hand to be caught in the machine, and, being unable to stop it by means of the lever, he was severely injured. *Held:*

(1) The oil on the floor, though it may have been the originat-

ing cause of the injury, could not be said, as a matter of law, to be the "efficient cause" thereof.

(2) The failure to notify the employee of the danger arising from the fact that the machine could not be stopped under such circumstances—that danger being a hidden one—was negligence on the part of the employer. *Ibid.*

14. Upon evidence tending to show that the fall of a derrick in a quarry, whereby an employee therein was killed, resulted from the negligent fastening of a guy anchor under the personal direction of one of the employers; that the deceased had nothing to do with such fastening; and that it was not within his observation in the usual course of his employment, the question whether deceased had assumed the risk is *held* to have been one for the jury. *Lounsbury v. Davis,* 432

15. In the absence of any request for specific instructions or the submission of a separate question as to assumption of risk, the failure to submit that issue otherwise than as it was included in the question whether deceased was guilty of contributory negligence, was not error. *Ibid.*

16. It appearing from the evidence that the fall of the derrick was due either to the overloading thereof or to the pulling out of the guy anchor at the point where it was weighted down, it was not error to refuse an instruction that if it was as probable that the accident resulted from an unknown cause as from any cause charged, then defendants cannot be said to have been guilty of negligence in respect to any cause charged. *Ibid.*

17. It was error to permit a witness to testify that the guy anchor pulled out because there was not stone enough weighting it down, since he thereby gave his opinion upon a question to be passed upon only by the jury. *Ibid.*

18. The exclusion of evidence tending to show that it was the duty of the deceased, as a foreman, to look after the security of the guy anchor, was error. *Ibid.*

19. Where an employee engaged in pushing tram cars on an elevated platform at a coal dock must, if he gave even slight attention to his surroundings, have observed that there was no railing on the edge of the platform and whether the platform was sufficiently lighted at night, his continuance in the service was an assumption of the risks incident thereto arising from the negligence, if any, of the employer in failing to provide a railing or to furnish sufficient light. *Faber v. C. Reiss Coal Co.* 554

Master's liability for servant's torts.

20. Where a floor walker in a store knew that a customer had not stolen goods, but falsely or by a trick made it appear that she had, and imprisoned and assaulted her in order to extort money from her, his employer is not liable for such acts, they being wholly outside the scope of the employment. *Cobb v. Simon,* 467

Admissions by employee. See EVIDENCE, 3.

MAXIMS.

Expressio unius est exclusio alterius, 218, 502, 505.

Stare decisis, 194, 209.

MEASURE OF DAMAGES. See CONTRACTS, 3–13. DAMAGES. INSURANCE, 6.

MECHANICS' LIENS. See JUDGMENT, 3.

MEDICAL EXPERTS. See EVIDENCE, 6.

MEMORANDA as evidence. See EVIDENCE, 2.

MILWAUKEE CITY CHARTER. See MUNICIPAL CORPORATIONS, 2–10.

MILWAUKEE county and city: Jurisdiction of courts. See JUSTICES' COURTS.

MINORS. See INFANTS. MASTER AND SERVANT, 1–6.

MISTAKE in description. See ADVERSE POSSESSION. DEEDS, 3. REFORMATION.

MONEY HAD AND RECEIVED.

An action for money had and received can be maintained only when the defendant has received money which, in equity and good conscience, he ought to pay to the plaintiff. *J. V. LeClair Co. v. Rogers-Ruger Co.* 44

MORTGAGES.

What constitutes a mortgage.

1. A deed given as security for a loan, and a written defeasance by which the lender agreed to reconvey upon payment of the debt, together constituted a mortgage. *Wells v. Scanlan,* 229

Assignment in fraud of creditors. See GARNISHMENT.

Rents paid to mortgagee: Accounting.

2. By the terms of a lease of mortgaged premises the rents were to be paid to one of the mortgagees and by him applied on taxes, insurance, and the mortgage debt. After a year the rent was reduced, with the consent of the mortgagor. *Held,* that the mortgagees were not chargeable with the difference between the original and the reduced rental. *Wilmarth v. Johnson,* 320
3. Out of the rents collected said mortgagee paid back insurance, back taxes, and bills for repairs. The mortgage provided that the property should be kept insured by the mortgagor. Said payments were made with the consent of the mortgagor for the purpose of preserving and keeping up the property and securing an income therefrom. *Held,* that the sums so paid should not be charged against the mortgagees. *Ibid.*

Foreclosure: Where cause of action accrues. See LIMITATION OF ACTIONS, 3.

MUNICIPAL CORPORATIONS.

Ordinances granting franchises: Submission to vote of electors. See STREET RAILWAYS.

1. Under sec. 959—52, Stats. 1898 (providing that applications for certain franchises shall be submitted to the electors of the city or village if such submission is requested by a petition "signed by at least twenty per cent. of the electors of such city or village, as appears by the poll list of the last general election"), the petition must be signed by twenty per cent. of the electors whose names appear on such poll list. *State ex rel. Hanlon v. Russell,* 548

Regulation of locomotives and location of tracks. See RAILROADS, 7.

Jurisdiction of common council: Action by alderman in "official capacity." See BRIBERY.

Street improvements: Property chargeable: Negligence: Rights of nonabutting owners.

2. In sec. 2, ch. VII, of the Milwaukee city charter—sec. 5, ch. 388, Laws of 1889—(providing that the grading, etc., of any street "shall be chargeable to and payable by the lots fronting or abutting upon such street," etc.), the phrase "lots fronting or abutting upon such street" includes only the property which borders on the street being improved. *Damkoehler v. Milwaukee,* 144

3. Thus, the owner of land between which and the street in question there is a strip 5.8 feet wide, being part of the same lot but owned by another person, is not chargeable with any part of the cost of improving such street, and, not being a party to the improvement proceedings, cannot rely upon any defect or irregularity therein as a ground for the recovery of damages for injury to his premises resulting from the doing of the work. The nonabutting owner does not have the same right of action, in such a case, as that which, *under the statute,* accrues to the abutting owner. *Ibid.*

4. But where in such a case, through negligence of the city authorities in doing the grading, the street was excavated to such a depth that the intervening strip and also a part of the land of the nonabutting owner subsided and fell into the street, there was, in effect, a taking of said owner's property for public use, and the city is liable to him for the injury directly resulting from such unlawful invasion of his premises. *Ibid.*

Same: Void assessment: Reassessment: Right of abutting owner to damages. See ACTION, 10.

5. An assessment by the board of public works of the benefits and damages to abutting lots by reason of the grading of a street in Milwaukee was made without separate consideration of the several lots, although they were very differently affected by the improvement; it was not made at the time of viewing the premises, but at a different time and in the office of the board; and it assessed a uniform sum per front foot as benefits along the whole street, and awarded no damages whatever for injuries. *Held,* that under the city charter such assessment was void. *Haubner v. Milwaukee,* 153

6. By sec. 1210*e*, Stats. 1898, as amended by ch. 354, Laws of 1903, a reassessment is provided for in every case where a special assessment for street improvement is held invalid by reason of defects in the assessment of benefits and damages, whether such invalidity be determined in an action at law or one in equity. *Ibid.*

7. The amendment to sec. 1210*e*, Stats. 1898, by ch. 354, Laws of 1903, whereby a reassessment was provided for in legal as well as in equitable actions, was applicable to actions thereafter commenced, although the assessments complained of were made prior to its enactment. *Ibid.*

8. Although an abutting lotowner has no right, either by statute or at common law, to recover for damage to his land resulting from the original grading of the street done lawfully and regularly, yet where the city fails to proceed in the manner prescribed by law it becomes liable for the damage proximately caused to such owner by the improvement. *Ibid.*

9. The right of the lotowner in such a case to recover for the damage to his land could not be taken away by a subsequent amendment (ch. 354, Laws of 1903) of the statute relating to reassessment of benefits and damages; but no constitutional right of the lotowner is invaded by the provision, in such subsequent statute, for a reassessment of the amount of benefits which he ought to pay to the city, and a reassessment so provided for should be ordered in his action to recover for the damage, upon the original assessment being held invalid. *Ibid.*

10. If, in such a case, relating to land in the city of Milwaukee, the benefits as ascertained by such reassessment are less than the legal damages to which the lotowner is entitled, the difference is to be paid to him out of the proper ward fund. *Ibid.*

Same: Void assessment: Tax certificates: Limitations.

11. Where a special assessment for street improvements is void, not for want of power on the part of the city, but because of a failure to take the necessary steps in the exercise of such power, the land assessed is "liable to taxation" within the meaning of sec. 1189, Stats. 1898, and the statute of limitations (sec. 1210*h*) is applicable to the tax certificate issued upon a sale for such assessment. *Hamar v. Leihy,* 265

12. Although the assessment upon abutting property may be void in such a case because no grade for the street was established, as required by the city charter, before the improvement was made, such property is nevertheless within the taxing district and liable to taxation within the meaning of sec. 1189. *Ibid.*

13. If the assessment is void because the land of one owner was assessed together with a strip belonging to another, the statute of limitations (sec. 1210*h*) is nevertheless applicable to the tax certificate. *Ibid.*

14. A portion of a city lot was embraced within the right of way of a railroad. A certain amount for street improvement was specially assessed upon the other portion, excluding the right of way, and the tax certificate issued upon a sale for such assessment described the lot by number, "less right of way." *Held,* that the assessment was not void on the ground that the two parts of the lot, belonging to different owners, were assessed together. *Ibid.*

Same: Voluntary payment of assessment.

15. In proceedings for the improvement of a street under a city charter, the assessment of benefits having been confirmed upon due notice to all persons interested, and all subsequent steps having been taken in accordance with the charter and upon due notice, payment of the assessment against an abutting lot, made by the owner's agent in charge thereof without protest or objection, was a voluntary payment, and the money paid cannot be recovered back. *Shirley v. Waukesha,* 239

16. A lotowner who has voluntarily paid an assessment of the benefits from a street improvement cannot thereafter maintain an action to set aside such assessment and for a reassessment. *Ibid.*

MUNICIPAL COURTS. See COURTS, 2, 3.

NECESSARIES furnished to wife. See HUSBAND AND WIFE. WITNESSES, 2.

NEGLIGENCE.

Test of negligence in use of dangerous appliances.

1. In a purely tort action negligence of the defendant in the use of appliances in a dangerous business is not to be tested or measured by the usage of others in the same business in a given small locality. *Rylander v. Laursen,* 2

Simple negligence: Amendment of pleading.

2. Where the cause of action stated was plainly one for simple negligence, it was not error to permit plaintiff, at the opening of the trial, to strike from the complaint words characterizing defendants' act as "wilful, wanton, and reckless." *Williams v. North Wisconsin L. Co.* 328

What is negligence: "Ordinary care" defined.

3. Ordinary care is that degree of care usually or ordinarily exercised by persons of ordinary care and prudence (or the great majority of people) engaged in the same or similar business under the same or similar circumstances; and a charge defining it as such care as persons of ordinary care and prudence ordinarily use "under all the facts and circumstances surrounding them at the time," was erroneous. *Ibid.*

Same: Instructions to jury.

4. The instructions and general charge in this case are criticised as stating, in substance, that notwithstanding none of the facts necessary to charge the defendant company with negligence had been proven, still if the jury found the company guilty of negligence which was the proximate cause of the injury they might find a verdict against the company—thus apparently giving the jury liberty to pronounce anything negligence which they might choose. *Ibid.*

Negligence causing death: Pleading. See DEATH.

Killing person by culpable negligence. See HOMICIDE, 2.

Injuries to employees. See MASTER AND SERVANT, 8–19. RAILROADS, 14.

Injury to pedestrian by truck left on sidewalk. See RAILROADS, 11–13.

Injury to person or property from defective highway. See HIGHWAYS, 5–9.

Injury to land: Negligence in grading street. See MUNICIPAL CORPORATIONS, 4.

Injury to live-stock in defective car. See RAILROADS, 9, 10.

Injury to property by fires negligently set: Instructions to jury.

5. In an action for damages for the destruction of property by fires alleged to have been set by sparks from defendant's sawmill, there being no evidence as to what spark arresters were used by other mill operators, or even that there were any other mills in that locality, it was error to instruct the jury that it was defendant's duty to use such reasonable means and appliances as were commonly and usually used by men engaged in the same or similar business in that locality in preventing fires from escaping from the smokestacks of their mills. *Rylander v. Laursen,* 2

6. Such instruction was inaccurate, also, because giving as a test of defendant's negligence the use of such appliances as are "commonly and usually used by men engaged in the same or similar

business," whereas the true test is the use of such appliances as are ordinarily used by men of ordinary care and prudence, or by men generally, engaged in the same or similar business under the same or similar circumstances. *Ibid.*

7. Where there was credible evidence tending to show that a fire set by sparks from defendant's mill had been burning some time on his own premises to the knowledge of his employees, and had been negligently allowed to escape, it was error to charge that if defendant was not negligent in allowing sparks to escape from his smokestack he was not negligent in allowing the fire to escape from him after it was discovered. *Ibid.*

NEGOTIABLE INSTRUMENTS. See BANKS AND BANKING. GARNISHMENT. GUARANTY, 2. JUDGMENT, 2.

NEW TRIAL.

See JUDGMENT, 3, 4.

1. The ordering of a new trial on its own motion is a matter within the discretion of the trial court, and is not to be reviewed on appeal unless there was an abuse of such discretion. *Eggen v. Fox,* 534

2. Where the specific grounds upon which a new trial was ordered on the trial court's own motion do not appear, it is presumed that the court acted within its discretionary power. *Ibid.*

NONRESIDENTS. See COMMERCE. LIMITATION OF ACTIONS, 3. TAXATION, 8.

NOTICE.
Of loss of check. See BANKS, 3.
Of ownership of chattels. See CONVERSION, 1.
Of claim that assignment is void. See GARNISHMENT, 1.
Of proceeding to discharge sureties. See GUARDIAN AND WARD, 1.
Of personal injuries. See LIMITATION OF ACTIONS, 1, 2.
Of defects in machinery, etc. See MASTER AND SERVANT, 11, 13, 14, 19.
Of special assessments. See MUNICIPAL CORPORATIONS, 15.
Of agency. See PRINCIPAL AND AGENT.
Of condemnation proceedings. See RAILROADS, 6.
Of defects in stock car. See RAILROADS, 10.
Of agent's lack of authority. See SPECIFIC PERFORMANCE, 3.

NUISANCE. See ADJOINING LANDOWNERS. WATERS.

OBTAINING MONEY BY FALSE PRETENSES. See FALSE PRETENSES.

OFFER to return property. See CONVERSION, 2, 3.

OFFICERS.
County supervisors. See COUNTIES, 1.
Sheriffs, constables, etc. See CONVERSION. COUNTIES, 2, 3.
District attorney. See CRIMINAL LAW, 3, 4. FISH AND GAME, 2. MALICIOUS PROSECUTION.
Aldermen. See BRIBERY.
Fish and game wardens. See FISH AND GAME, 2, 5.

OPINION EVIDENCE. See EVIDENCE, 1, 5–7. MASTER AND SERVANT, 17. PARTNERSHIP, 3. WITNESSES, 1.

OPTIONS to purchase land. See CONTRACTS, 3.

ORDINANCES. See BRIBERY. MUNICIPAL CORPORATIONS, 1. STREET RAILWAYS.

OVERFLOW of lands. See WATERS.

PARENT AND CHILD. See DEEDS, 2, 3. INFANTS. MASTER AND SERVANT, 1–6.

PARK LANDS: Condemnation for railroad. See RAILROADS, 8.

PARTIAL PERFORMANCE. See CONTRACTS, 4–13. DAMAGES. SPECIFIC PERFORMANCE, 4, 5.

PARTIES. See COURTS, 1. GARNISHMENT, 2. INSURANCE, 5. JUDGMENT, 1, 3, 4. PARTNERSHIP, 13.

PARTNERSHIP.

Dissolution: Settlement: Claim excepted: Collection: Evidence.

1. In an action between former partners or their successors in interest to recover a share of a debt due the firm which had been excepted from the partnership settlement, it being alleged that plaintiff's share had afterwards been collected by defendant through certain logging transactions with the debtor, the evidence is *held* not to show that defendant had collected or received any part of such debt. *J. V. LeClair Co. v. Rogers-Ruger Co.* 44
2. Evidence in such case, offered by defendant, as to money and supplies furnished to the debtor in the logging transactions mentioned, and tending to show that said debtor was still indebted to defendant on account of such transactions, was admissible. *Ibid.*
3. It appearing from the debtor's own testimony that he did not know even approximately how much timber had been taken from certain lands under his contract with defendant or what the profits therefrom were, he was not competent to testify that it had always been his idea, and he still thought, that there was enough timber taken from such land to pay certain prior claims and also the debt in which plaintiff was interested. *Ibid.*

Same: Lien of creditors: Rights of incoming partner.

4. Creditors of a partnership have no claim or lien upon the firm property other than creditors generally have on a debtor's property; and the partnership has the same right to dispose of its assets that individuals have. *Reddington v. Franey,* 590
5. The equity between partners to have the firm assets applied to payment of its debts may be preserved by an outgoing partner for his protection, and when so preserved will inure to the benefit of the creditors, who may claim through such partner's equity. *Ibid.*
6. Where a retiring partner sold to an incoming one his interest in the firm assets and agreed to pay all the outstanding liabilities, neither he nor the creditors had any lien upon the firm assets or equity to compel application thereof to such liabilities; and, there being no obligation on the part of the incoming partner to pay the debts of the old firm, the fact that he does pay them gives him no right of action to recover the amount so paid from the retiring partner. *Ibid.*

Same: Death of partner: Accounting and settlement: Administrators: Legatees: Limitations. See COURTS, 1.

7. In an action by the personal representative of a deceased partner for a partnership accounting and settlement, there being no

suggestion in the complaint that the persons interested in the estate of the deceased, some of whom were minors without guardians, had settled the partnership matter, no such settlement will be presumed, on demurrer, to have taken place. *Stehn v. Hayssen,* 583

8. Neither the widow nor the children of the deceased partner, to whom he gave by will his entire estate, could take title to such partnership interest except through the medium of an executor or administrator; and upon appointment of an administrator the right to recover such interest vested in him. *Ibid.*

9. From the complaint in the action for an accounting it appeared that the widow and children were ignorant of their rights under the will and of their right to an accounting; that the widow did not qualify as executrix; that no administrator was appointed until about sixteen years after the will was proved, when one of the testator's sons, within a few months after attaining majority, was appointed administrator with the will annexed and commenced the action. *Held,* on demurrer, that the complaint did not show laches. *Ibid.*

10. There being no person in existence who could bring the action for an accounting until the appointment of plaintiff as administrator, the cause of action did not accrue until such appointment, and the action was not barred, under sec. 4221, Stats. 1898, at the expiration of ten years after the dissolution of the partnership by the death of plaintiff's testator. *Ibid.*

11. Defendant, not having pleaded a limitation under sec. 4251, Stats. 1898, could not rely thereon, even if the time limited thereby had expired. *Ibid.*

12. Failure to present a claim on behalf of the testator's estate against the estate of the subsequently deceased partner did not operate as a bar, under sec. 3844, Stats. 1898, to the action for an accounting, or prevent the reaching of partnership property therein, whatever its effect might be as to a money recovery against the last-mentioned estate. *Ibid.*

13. That the testator's widow may, contrary to legal right, have participated in continuing the business of the partnership—no such fact being stated in the complaint—is not ground for a demurrer for defect of parties upon the theory that the widow is a necessary party. *Ibid.*

PAYMENT. See FRAUD. GUARANTY, 3. MUNICIPAL CORPORATIONS, 15, 16. TAX TITLES, 1, 2.

PERFORMANCE. See CONTRACTS. DAMAGES. SPECIFIC PERFORMANCE.

PERMANENCY of injuries. See EVIDENCE, 6.

PERSONAL INJURIES. See HIGHWAYS, 5–7. LIMITATION OF ACTIONS, 1, 2. MASTER AND SERVANT, 8–19. RAILROADS, 11–14.

PHYSICIANS AND SURGEONS. See EVIDENCE, 6. HEALTH. HUSBAND AND WIFE. RAPE, 1.

PLACE.
Where crime was committed. See FALSE PRETENSES, 1.
Where saw logs are taxable. See TAXATION, 5–7.

PLAT OF LANDS. See ADVERSE POSSESSION, 2.

PLEADING.

Complaint or petition: Sufficiency. See CERTIORARI. EJECTMENT. FISH AND GAME, 2.

Same: Joinder of causes of action. See ACTION, 1–9.

Same: Construction on demurrer: Presumptions. See PARTNERSHIP, 7, 9, 13.

1. In determining whether a complaint states a cause of action the question is not whether the pleader used the most appropriate language to that end, but whether the language used will permit reasonably of a construction sustaining the intent of the pleader in view of the rule that all facts necessary thereto not expressly alleged which can reasonably be inferred from what is stated are to be regarded as properly pleaded. *Manning v. School District,* 84

2. On demurrer to a pleading every reasonable intendment and presumption is to be made in favor thereof for the purpose of supporting it. All unfavorable constructions are to be deemed subordinate to those which are reasonably otherwise, and all essentials are to be regarded as sufficiently stated which can by reasonable construction and inference be discovered in the language used. *Emerson v. Nash,* 369

Same: Indefiniteness or uncertainty: Remedy.

3. A pleading is never to be condemned on demurrer for mere indefiniteness or uncertainty. The proper remedy therefor is a motion to make it more definite and certain. *Ibid.*

Same: Striking out irrelevant matter. See APPEAL, 3. NEGLIGENCE, 2.

Supplemental complaint: Changing cause of action. See SPECIFIC PERFORMANCE, 2.

Answer: Limitations. See PARTNERSHIP, 11.

Same: Demurrer to part of a defense.

4. Under sec. 2658, Stats. 1898, providing that "the plaintiff may demur to the answer or any defense therein," a demurrer cannot be addressed to a part only of a defense. *McCall Co. v. Stone,* 572

Same: Counterclaim: Construction.

5. Failure by one to perform his contract with another entitling that other to a modification or extinguishment of the contract price may be pleaded as a defense or counterclaim. *Manning v. School District,* 84

6. It being reasonably plain that the defendant intended to plead a counterclaim, matter stated in the answer outside that portion devoted specially to the counterclaim or stated in the complaint, if referred to for that purpose directly or circumstantially, is to be regarded as incorporated in the statement of the counterclaim. *Ibid.*

7. In applying the last rule where the plaintiff indicates that he considers the facts necessary to the counterclaim not stated in that portion of the answer specifically devoted thereto as alleged by reference directly or circumstantially to other portions of the answer or to statements in the complaint by replying, that view should prevail unless the language of the counterclaim as a whole will clearly not reasonably admit thereof. *Ibid.*

Amendment of pleading. See CONTRACTS, 12. NEGLIGENCE, 2.

Pleading in criminal actions. See CRIMINAL LAW, 12, 13. FALSE PRETENSES, 4.

POLICE POWER. See FISH AND GAME, 1.

POSSESSION of land. See ADVERSE POSSESSION.

POWERS. See WILLS, 1.

PRACTICAL CONSTRUCTION.
Of deed. See ADVERSE POSSESSION. DEEDS, 5.
Of statute. See INSURANCE, 2.

PRACTICE. See ABATEMENT AND REVIVAL. ACTION. APPEAL AND ERROR. BASTARDY. CERTIORARI. COUNTIES, 5, 6. COURTS. CRIMINAL LAW AND PRACTICE. DAMAGES. DEATH. DEPOSITIONS. EVIDENCE. GARNISHMENT, 2–4. JUDGMENT. JURY. JUSTICES' COURTS. LIMITATION OF ACTIONS. NEGLIGENCE, 2. NEW TRIAL. PLEADING. RAILROADS, 6. SPECIFIC PERFORMANCE, 1, 2. TRIAL. WITNESSES.

PRELIMINARY EXAMINATION. See CRIMINAL LAW, 1.

PRESCRIPTION. See ADVERSE POSSESSION.

PRESUMPTIONS. See APPEAL, 10. FISH AND GAME, 7. HUSBAND AND WIFE, 3. PARTNERSHIP, 7, 13. RAILROADS, 11. TAXATION, 3, 6. TRIAL, 2.

PRIMARY RIGHTS. See ACTION, 2–9.

PRINCIPAL AND AGENT.

See BANKS, 1. BROKERS. EVIDENCE, 1, 3. MASTER AND SERVANT, 20. REFORMATION, 4.

Where in making a contract an agent apparently acts for himself, and those dealing with him do not know and are not chargeable with knowledge of the facts as to the agency, he renders himself personally liable. *Alexander & Edgar L. Co. v. McGeehan*, 325

PRINCIPAL AND SURETY. See GUARANTY. GUARDIAN AND WARD. JUDGMENT, 2.

PRIORITY in payment from estate. See EXECUTORS.

PRIVILEGED COMMUNICATIONS. See RAPE, 1.

PROMISSORY NOTES. See GARNISHMENT. GUARANTY, 2. JUDGMENT, 2.

PROXIMATE CAUSE. See HIGHWAYS, 7. MASTER AND SERVANT, 12, 13.

PUBLIC HEALTH. See HEALTH. JUSTICES' COURTS, 2.

PUBLIC PARKS: Condemnation for railroad. See RAILROADS, 8.

QUANTUM MERUIT. See CONTRACTS, 12, 13.

RAILROADS.

Organization: Articles.

1. The requirement of sec. 1820, Stats. 1898, that the articles of organization of a railroad corporation shall state "the places from and to which such railroad is to be constructed or maintained and operated," does not refer necessarily to places within the state, but is complied with by the designation of termini without the state. *In re Milwaukee Southern R. Co.* 490
2. The requirement of said sec. 1820 that the length of the proposed railroad be stated, refers to the length of the road between the termini, and is not limited to the portion within the state. *Ibid.*

Condemnation of land: Petition: Evidence: Dismissal as to part of lands: Streets: Public parks.

3. The fact that a railroad company is duly incorporated, required by sec. 1846, Stats. 1898, to be stated in a petition for condemnation of lands, is conclusively shown, under sec. 4181, by production of its patent of incorporation issued by the state. *In re Milwaukee Southern R. Co.* 490

4. The fact that a railroad corporation intends in good faith to construct the road authorized by its charter is conclusively shown, in proceedings for the condemnation of land, by the production of its patent of incorporation issued by the state. DODGE and WINSLOW, JJ., dissent. *Ibid.*

5. The requirement of sec. 1846, Stats. 1898, that it shall appear that the petitioner "has surveyed its route over the land sought to be acquired for its main line and has actually staked out the center line of its proposed road over the grounds desired for such main line," refers only to that part of the main line covering the land sought to be acquired in the specific proceeding. *Ibid.*

6. The fact that condemnation proceedings must be dismissed as to some of the lands described because of insufficiency of notice to the owners does not deprive the court of jurisdiction to proceed as to the lands whose owners were given proper notice, although such lands do not constitute a continuous part of the line of the proposed road. *Ibid.*

7. The power given by subd. 5, sec. 1828, Stats. 1898, to a railroad corporation to construct its tracks across, along, or upon streets or highways is in no way superseded or take naway by the power given to a city "to regulate and prohibit the use of locomotive engines within the city and to control the location of railroad tracks." *Ibid.*

8. Under our statutes a railroad corporation has no right to condemn and take for its uses any part of a public park if without such taking it can efficiently and beneficially exercise the power of locating and building its road between the termini thereof. *Ibid.*

Carriers: Contracts: Negligence: Acceptance of defective cars.

9. A stipulation, in a contract for the carriage of live stock, whereby the shipper accepts the cars furnished by the carrier and acknowledges that they are sufficient and suitable in every respect, does not relieve the carrier from liability for injury resulting from its negligence in supplying unsuitable or defective cars. *Nevius v. C., St. P., M. & O. R. Co.* 313

10. The question whether plaintiff's agent knew, or was chargeable with knowledge, of a defect in the car in which plaintiff's horses were shipped, is *held*, upon the evidence, to have been one for the jury. *Ibid.*

Negligence: Injury to pedestrian: Truck on sidewalk: Evidence.

11. Negligence of the railway company is not to be presumed, under the rule of *res ipsa loquitur*, from the mere fact that one walking at night on the sidewalk adjacent to a station platform was injured by falling over a truck belonging to the company, which had been left on the walk. *Tiborsky v. C., M. & St. P. R. Co.* 243

12. Upon the evidence in such a case—tending to show, among other things, that the truck was customarily used by the company's employees at and near the place of the accident, and not showing that any one else had had anything to do with it—it is *held* that the question of the company's negligence was one for the jury. *Ibid.*

13. The fact that, in such case, the injured person went, immediately after the accident, into the depot and told the telegraph operator what had happened, did not make the reply of such operator admissible in evidence as part of the *res gestæ*. *Ibid.*

Same: Injuries to employees: Fellow-servants.

14. Sec. 1816, Stats. 1898 (making railroad companies liable for all damages sustained by their employees, under certain circumstances, through the negligence of other employees), applies only to railroad companies engaged in a general railroad business for the carriage of passengers and freight, and does not apply to a private railroad used as an incident to conducting a private business. *McKivergan v. Alexander & E. L. Co.* 60

Notice of personal injuries: Waiver by claim agent. See LIMITATION OF ACTIONS, 2.

RAPE.

See CRIMINAL LAW, 12.

1. Information acquired by a physician in the examination of a child who was brought to him after an alleged rape, not for treatment, but for the sole purpose of determining whether she then had a venereal disease from which defendant was suffering at the time of the alleged offense, was not privileged under sec. 4075, Stats. 1898. *James v. State,* 130

2. Offers of settlement and confessions of guilt made by defendant after his arrest, and not induced by either threats or promises, were not rendered inadmissible in evidence by the fact that he had asked the officer in charge of him whether he had better make an offer to settle, and the officer had replied that he would not advise him to settle anything of which he was not guilty. *Ibid.*

3. It being claimed that the child alleged to have been raped had contracted a venereal disease from defendant, evidence for the defense as to reputation of the mother's house, in which the child lived, was not admissible in the absence of anything to show that defendant could or expected to prove that the mother was a prostitute and herself afflicted with such a disease, which she might have communicated to the child. *Ibid.*

RATIFICATION. See GUARANTY, 3.

REAL-ESTATE BROKERS. See BROKERS. CONTRACTS, 3.

REAL PROPERTY. See ABATEMENT, 2. ADJOINING LANDOWNERS. ADVERSE POSSESSION. APPEAL, 1. BROKERS. CONTRACTS, 3. COUNTIES, 5, 6. DEEDS. EJECTMENT. FALSE PRETENSES, 2. JUDGMENT, 3, 4. LIMITATION OF ACTIONS, 3. MORTGAGES. MUNICIPAL CORPORATIONS, 2–4. RAILROADS, 3–8. REFORMATION. SPECIFIC PERFORMANCE. TAXATION, 2–4. TAX TITLES. WATERS. WILLS.

REASONABLE DOUBT. See FISH AND GAME, 8.

RE-ASSESSMENT. See MUNICIPAL CORPORATIONS, 6, 7, 9, 10, 16.

REBUTTAL. See CRIMINAL LAW, 2.

RECORD of tax deed. See TAX TITLES, 7.

REFERENCE. See APPEAL, 1.

REFERENDUM. See MUNICIPAL CORPORATIONS, 1. STREET RAILWAYS.

REFORMATION OF INSTRUMENTS.

See DEEDS, 3.

1. To warrant the reformation of a written instrument on the ground of mistake it must be clearly shown that the mistake was mutual and that both parties intended to make an instrument different from the one sought to be reformed. *Kruse v. Koelzer*, 536
2. Thus, where the purchasers of part of a lot expected to get seventy-five feet in depth, all parties supposing that the lot was 150 feet deep, as it was shown on a plat, but the vendors only agreed to sell one half and intended to and did in fact convey only one half, there was no mistake warranting reformation of the deed so that it should convey seventy-five feet, although it was found that the lot was in fact less than 150 feet in depth. *Ibid.*
3. The purchasers' acceptance of the deed in such a case, with nothing to prevent their being chargeable with knowledge of its contents, and their acquiescence for a long time, during which the vendors had changed their position on the faith of the deed, would bar any right to a reformation, whatever were the facts as to the understanding between the parties with reference to the description of the land. *Ibid.*
4. A receipt for earnest-money given by the agent who negotiated the sale, describing the property as seventy-five feet in depth, although his only authority was to sell one half, the vendors knowing nothing of this receipt until long after the execution of the deed, was not an antecedent contract admissible in evidence to explain the deed or to be construed with it. *Ibid.*

REGISTRY OF DEEDS. See TAX TITLES, 7.

RELEASE of sureties. See GUARDIAN AND WARD.

REPUTATION of house in which complainant lived. See RAPE, 3.

RESCISSION. See DEEDS, 2.

RES GESTÆ. See RAILROADS, 13.

RES IPSA LOQUITUR. See RAILROADS, 11.

RES JUDICATA. See JUDGMENT, 5.

RETURN of property. See CONVERSION, 2, 3.

REVIVAL of actions. See ABATEMENT AND REVIVAL.

ROADS AND STREETS. See HIGHWAYS. MUNICIPAL CORPORATIONS, 2–16. RAILROADS, 7.

SALES.

Bill of sale: Construction: Parol evidence.

1. A bill of sale of property described as "a complete sawmill, consisting of [certain specified articles], together with all equipments and everything pertaining thereto or in any way connected therewith," contained also the statement that the sale

was made by virtue of a chattel mortgage "which covers the property which is sold or evidenced by this bill of sale." The description in the mortgage was substantially the same as in the bill of sale. *Held*, that the reference in the bill of sale to the mortgage did not restrict the property conveyed to that actually covered by the mortgage, so as to exclude equipment added to the mill after the mortgage was given. *Edwards v. Wis. Inv. Co.* 315

2. Parol evidence of extrinsic facts was admissible in such case to show whether or not a bull chain and attachments, leased to the mortgagor after the mortgage was given and by him set up on the premises for use in connection with the mill, were included in the property described in the bill of sale. *Ibid.*

Measurement at later time: Contract construed.

3. Where it is apparent from a contract of sale that the parties intended that the measurement of the subject thereof and determination of the amount to be paid should be made at some time after the title had passed, that intention will govern. *Fromme v. O'Donnell,* 529

4. Plaintiff's assignor contracted to furnish to defendant "enough" pine blocks to pave a certain viaduct, for a certain price per square yard, f. o. b. cars in the city where they were to be used, payment to be made monthly as estimates of the engineer in charge of the work were allowed by the common council for deliveries made during the previous month, defendant "to pay the freight and deduct same from the settlement." *Held*, that title to the blocks passed to defendant upon his accepting them from the cars, but that the measurements from which the amount to be paid should be determined were to be made after the blocks were laid in place on the viaduct. *Ibid.*

Sale in original package: Interstate commerce. See COMMERCE.

Sale of fish and game. See FISH AND GAME.

SALES FOR TAXES. See TAX TITLES.

SALES OF LAND. See BROKERS. COUNTIES, 5, 6. DEEDS. REFORMATION. SPECIFIC PERFORMANCE.

SATISFACTION. See CONTRACTS, 8.

SAW LOGS: Place of assessment. See TAXATION, 5–7.

SCOPE OF EMPLOYMENT. See MASTER AND SERVANT, 20.

SELF-DEFENSE. See HOMICIDE, 5–13.

SERVICE of notice of personal injuries. See LIMITATION OF ACTIONS, 1, 2.

SETTLEMENT of partnership affairs. See COURTS, 1. PARTNERSHIP, 7–13.

SHERIFFS AND CONSTABLES. See CONVERSION. COUNTIES, 2, 3.

SIDEWALKS. See HIGHWAYS, 5.

SPECIAL PROCEEDINGS. See APPEAL, 1, 2.

SPECIAL VERDICT. See MASTER AND SERVANT, 15.

SPECIFIC LEGACY. See WILLS, 2.

SPECIFIC PERFORMANCE.

Election to recover damages. See ABATEMENT, 2.

1. If, pending an action for specific performance of a contract to convey land, defendant has, by a sale to another person, put it out of his power to convey to plaintiff, the latter may, in such equitable action, recover his damages for the breach of contract. *Fleming v. Ellison,* 36
2. Where in such a case the defendant died after conveying the land to a third person, and plaintiffs, by a supplemental complaint, elected to take damages in lieu of specific performance, the cause of action was not changed from equity to law, and the action might be revived against defendant's administrator. *Ibid.*

Oral agreement to sell lands: Completed contract: Part performance.

3. The plaintiff corporation having an option to purchase certain lands, an oral agreement was made between it and defendants' agent that defendants would purchase the lands from the owner and, after removing the timber, convey them to plaintiff for a certain price stated in plaintiff's written offer, which, with the oral agreement, was to be submitted to one of the defendants personally for acceptance. The written offer was retained by said defendant but never accepted in writing. Acting upon the oral agreement with the agent, plaintiff relinquished its option to purchase the lands. Plaintiff knew that the agent had no authority to purchase lands for defendants as contemplated by that agreement. The lands were then purchased by defendants, who afterwards refused to convey to plaintiff. *Held,* that there was no completed contract between the parties of which specific performance could be enforced. *J. L. Gates Land Co. v. Ostrander,* 287
4. Plaintiff's relinquishment of its rights under the option to purchase, before the proposed oral agreement had been accepted, was not an act of part performance under and in pursuance of an agreement with defendants so as to constitute a basis for enforcing specific performance. *Ibid.*
5. There being facts from which the inference is legitimate that plaintiff may have relinquished its option because it did not intend to purchase the lands upon the terms thereof, such relinquishment cannot be held clearly and exclusively referable to, and done in pursuance of, the oral agreement, so as to warrant the enforcement of specific performance. *Ibid.*

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS.

STATUTES.

Constitutionality. See COMMERCE, 2, 3. FISH AND GAME, 1. MUNICIPAL CORPORATIONS, 9.

Construction. See ACTION, 1–9. APPEAL, 1–3, 12, 13. BASTARDY, 1. BRIBERY. COMMERCE, 2, 3. COUNTIES, 2, 3, 6. COURTS, 2, 3. CRIMINAL LAW, 1, 4, 6, 14. DEPOSITIONS. EXECUTORS. FISH AND GAME, 2, 8. FRAUDS, STATUTE OF. GARNISHMENT. GUARDIAN AND WARD, 1. HEALTH. HIGHWAYS, 1–4. HOMICIDE, 1, 2. INSURANCE. JURY, 1–3. JUSTICES' COURTS, 1–3. LIMITATION OF ACTIONS. MUNICIPAL CORPORATIONS, 1, 2, 5–13. PARTNERSHIP,

10–12. PLEADING, 4. RAILROADS, 1–8, 14. RAPE, 1. STREET RAILWAYS. TAXATION, 1, 2, 5, 8, 14–16. TAX TITLES, 4–7. TOWNS.

1. Where a general statute covering an entire subject matter is so repugnant to a special statute covering some particular part thereof that effect cannot reasonably be given to both, the latter is to be read as an exception to the former. *State ex rel. deForest v. Hobe,* 8

Same: Mandatory or directory. See COUNTIES, 2. INSURANCE, 2.

2. Where the words "may" and "shall" both occur in the same statute, it is presumed that they were used advisedly by the legislature and that each was intended to be given its distinctive meaning. *Equitable L. A. Soc. v. Host,* 657

Retroactive statutes. See MUNICIPAL CORPORATIONS, 7, 9.

Amendment and repeal. See BASTARDY, 1. COUNTIES, 3. MUNICIPAL CORPORATIONS, 6, 7, 9. RAILROADS, 7.

STATUTES CITED, ETC.

CONSTITUTION OF WISCONSIN.

Art. I, sec. 1 - - - 418
" I, " 9 - - - 163
" I, " 13 - 163, 418, 419
" X, " 2 - - - 466
" XI, " 3 - - - 304

SESSION LAWS.

1850. Ch. 44 - - - - 178
1851. " 158 178, 182, 202, 205–208
1851. " 158, sec. 1 - - 178
1862. " 108, " 2 - - 127
1862. " 182 - 179, 182, 204–208
1862. " 182, sec. 1 - 179, 180
1866. " 102, " 1 - 15, 17
1866. " 102, " 2 - - 17
1868. " 153 - - - - 579
1868. " 153, sec. 4 - - 580
1868. " 160 - - - - 579
1870. " 59 - 182, 185, 191, 205–208, 674, 675
1870. " 59, sec. 10 - - 674
1870. " 59, " 14 657, 674, 675
1870. " 59, " 19 - 181, 204
1870. " 59, " 28 - - 180
1880. " 117 - - - 576, 580
1881. " 197 - - - 114, 117
1885. " 175 - - - - 600
1887. " 309 - - - - 674
1889. " 27 - - - - 268
1889. " 271, sec. 1 - - 189
1889. " 388, " 5 - - 144
1889. " 509 - - - - 600
1891. " 367 - - - - 600
1891. " 376, sec. 1 169, 189, 192, 201–2, 204–5, 210, 214, 218
1891. " 418 - - - - 485

SESSION LAWS—con.

1893. Ch. 112, sec. 6 - - 56
1895. " 175 - - - - 485
1895. " 175, sec. 3 - - 485
1895. " 212 - - - - 431
1897. " 119 - - - - 41
1897. " 335, sec. 4 - - 348
1899. " 101 - - - 483, 485
1899. " 197 - - - - 600
1899. " 218, sec. 5 - 462, 464
1899. " 300, " 3 - 263–265
1899. " 356 - - - - 77
1899. " 356 (sec. 1678—11) 78
1899. " 356 (" 1681—17) 78
1899. " 356 (" 1684—2) - 77
1901. " 70, sec. 1 - 462, 464
1901. " 85 - - 635, 651, 654
1901. " 358, sec. 22 - - 417
1901. " 358, " 23 - 415, 424
1903. " 15 - - - - 218
1903. " 284 - - - - 11
1903. " 354 154, 161–163, 166–168
1903. " 387, sec. 1 451, 457, 458
1903. " 388 - - - 462, 464
1903. " 424 - - - - 600
1903. " 437, sec. 20 - - 417

MILWAUKEE CITY CHARTER.

Ch. VI, secs. 6, 8, 14 - - 164
" VI, sec. 15 - - - 166
" VII, " 2 - 144, 147, 165
" VII, " 6 - - - 165
" VII, " 7 - - 165, 168
" VII, " 8 - - - 165
" VII, " 11 - - 165, 166
" VII, " 12 - - - 166

STATUTES CITED, ETC.—con.

REVISED STATUTES OF 1858.

Ch. 37, sec. 6 - - - - 127
" 37, " 7 - - - 127, 128
" 71, " 20 - - - - 19
" 95 - - - - - 178
" 95, sec. 5 - - 179–182, 185
" 95 " 6 - - - 181, 185

TAYLOR'S STATUTES (1871).

Ch. 95, sec. 5 - - 179–182, 185
" 95, " 6 - - - 181, 185

REVISED STATUTES OF 1878.

Section 677 - - 576, 579–581
" 680 - - 576, 580–582
" 681 - - - - 582
" 1771 - - - - 485
Sections 1949, 1952 - - - 674
" 2340–2347 (ch. 108) - 178
Section 2347 181–2, 186, 189, 191, 204
" 3069, subd. 4 - - 431
" 4251 - - - - 589

S. & B. ANNO. STATUTES (1889).

Section 1210*h* - - - - 270

STATUTES OF 1898.

Section 661 - - - - 72
" 672 - - - 302, 303
" 677 - 576, 578, 579, 581
" 680 - - 576, 578–582
" 681 - - - - 582
" 959—52 - - 548, 549
Sections 1030–1222*m* (tit. XIII) 71
" 1034, 1038 - - - 17
Section 1038, subd. 9 - - 19
" 1040 - - - 271, 274
" 1056 - - - - 13
" 1061 - - - - 8, 11
Sections 1112, 1113 - - - 30
Section 1114 - - - 25, 31
" 1130 - 305, 308, 312, 313
" 1155 - - - 25, 34
" 1178 - - - - 306
" 1182 - - - - 33
" 1184 - - - 25, 34
" 1189 - - 265, 267, 269
" 1210*d* - - 161, 162
" 1210*e* 154, 160–162, 166–168
" 1210*f* - - - - 162
" 1210*g* - - - 25, 34
" 1210*h* - 265–267, 269–271
Sections 1272, 1273 - - 352, 356
Section 1311 - - - 352, 357
" 1319 - - - 352, 356

STATUTES OF 1898—con.

Section 1338 - - - 352, 357
" 1347*b* - - - 600
" 1411 - - - - 402
" 1412 - - - 400, 402
" 1416 - - - 400, 405
" 1421 - - - - 405
" 1498*g* - - - 415, 421
" 1535 - - 124, 127, 128
" 1536 - - - - 130
" 1770*b* - 469, 475, 476, 575
Sections 1792–1864*a* (ch. 87) 63, 64
Section 1816 - - 60, 62, 64, 65
" 1820 - - - - 490
" 1828, subd. 5 - 491, 500
" 1830 - - - - 497
" 1846 - - 490, 495, 504
" 1861 - - - - 62
" 1949 - - - - 674
" 1952 - 657, 669, 673–675
" 1955 - - - - 676
Sections 1955*a*–1955*m* - - 485
Section 1955*c* - - - - 485
Sections 1968, 1972*a* - - 676
Section 2024 (p. 1527, sec. 1) 15
" 2304 - - - - 291
" 2307, subd. 2 - - 511
Sections 2340–2347*a* (ch. 108) 178
Section 2347 169, 186, 191, 197, 208, 221, 225
Sections 2553–2555 - - 635, 653
Section 2604 - - - - 225
" 2639, subd. 4 - - 233
" 2647 - 160, 369, 382, 386
" 2651 - - - - 589
" 2658 - - - 572, 575
" 2668 - - 90, 369, 380
" 2753 - - - - 528
" 2767 - - - - 526
" 2768 - - - 520, 527
" 2772 - - - 520, 528
" 2788 - - - 480, 482
Sections 2800, 2803, 2811*a* 41
Section 2829 - 91, 369, 380, 606
" 2844 - - - - 160
" 2883 - - - - 265
" 2902 - - - 65, 72, 73
" 2932 - - - - 546
" 3047 - - - 263, 265
" 3069, subd. 1 - - 431
" 3069, " 2 - 263, 264
" 3071 - - - 480, 482
" 3294 416, 425, 462–3, 465–6
" 3295 - - - 416, 425
" 3501 - - - - 40
" 3574 - - - - 59
" 3602 - - - 415, 421

STATUTES CITED, ETC.—con.

STATUTES OF 1898—con.

Sections 3630, 3631 - - 114, 117
Section 3633 - - - - 117
Sections 3811, 3813 - - 544, 546
Section 3838 - - - - 547
" 3844 - - - 584, 589
Sections 3846, 3847 - - - 547
Section 3852 - - - 544, 547
" 3907 - - - - 40
" 3966 - - - - 346
" 3967 - - 339, 347–349
" 3972 - - - 339, 347
" 3981 - - - - 346
" 4037 - - - 460, 462
" 4075 - - - 130, 132
" 4078 - - - 635, 651
" 4086 - - - - 8, 9
" 4181 - - 490, 496, 505
Sections 4206–4252 (ch. 177) - 588

STATUTES OF 1898—con.

Section 4221 - - - - 584
" 4221, subd. 2 - 230, 231
" 4221, " 4 - - 588
" 4222, " 5 - 120, 121
" 4251 - - - 584, 589
Sections 4255, 4256 - - 432, 439
" 4262, 4263 - - 516, 518
Section 4281*b* - - 339, 348
Sections 4354, 4355 - - 486, 489
Section 4475 - - 635, 647, 648
" 4608 - - - 463, 466
Sections 4697, 4700 - - 623, 629
Section 4740 - - - - 645
" 4776 - - - 635, 645
" 4972, subd. 2 - 65, 72
" 4972, " 15 - - 580
" 4985 - - - - 190

STREET IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 2–16.

STREET RAILWAYS.

An ordinance granting the right to extend an existing street railway line or system upon other streets and highways in the city is not, if the term of such franchise is limited to expire at the same time as that of the existing franchise of which it becomes a part, subject to the provisions of sec. 1, ch. 387, Laws of 1903, in respect to submission of ordinances to a direct vote of the electors. *State ex rel. Leisk v. Common Council,* 451

STREETS.
Grading: Injury to land. See MUNICIPAL CORPORATIONS, 3, 4, 8–10.
Improvement: Special assessments, etc. See MUNICIPAL CORPORATIONS, 2, 5–16.
Railroads on or across. See RAILROADS, 7.

SUBMISSION OF CONTROVERSY. See APPEAL, 12.

SUPREME COURT. See APPEAL AND ERROR.

SURETYSHIP. See GUARANTY. GUARDIAN AND WARD.

SURPLUSAGE in pleading. See CRIMINAL LAW, 12. DEATH. NEGLIGENCE, 2.

TAXATION.

Double taxation: Construction of statutes.

1. Intent to impose taxation which is double even from an economic viewpoint is not to be ascribed to legislation in absence of clear and unambiguous expression. *First Nat. Bank v. Douglas Co.* 15

Exemptions: Capital of banks.

2. The word "capital" as used in sec. 1, ch. 102, Laws of 1866 (Stats. 1898, p. 1527),—providing that no tax shall be imposed upon the capital of any bank or banking association,—means the money

or property which the incorporators contribute and transfer to the corporation as capital, and which thus becomes its property; and the exemption includes the specific property purchased with money contributed as capital. *First Nat. Bank v. Douglas Co.* 15

3. The burden is upon the bank to prove clearly the exempt character of the property, and to show an appropriation of the very capital to its purchase, not merely purchase out of the general funds made up of deposits, surplus, and capital commixed. *Ibid.*

4. The fact that the assessors, in estimating the value of the shares of capital stock of a bank, did not include the value of certain real estate owned by it, and so fixed their value at less than the true value, does not preclude the bank from insisting that such real estate is exempt from taxation. *Ibid.*

Place of assessment: Saw logs.

5. Under sec. 1040, Stats. 1898, saw logs which are manufacturers' stock are to be assessed where located on May 1st, unless at that time it was the purpose of the owner to have them sawed or manufactured in some mill in this state, in which case they are to be assessed where such mill is located. *State ex rel. J. S. Stearns L. Co. v. Fisher,* 271

6. The determination of the assessor as to the place at which property is assessable, as well as his determination in respect to its value, when attacked before the board of review, is presumptively correct and should be overturned only upon definite evidence impeaching it. *Ibid.*

7. The evidence in this case is *held* sufficient to support the decision of the board of review, sustaining the assessor's determination, that on the 1st of May the owner of saw logs purposed having them sawed at the place where they were assessed, although on that day they were located elsewhere. *Ibid.*

Board of review: Taking evidence. See DEPOSITIONS.

8. Under sec. 1061, Stats. 1898, a board of review is to take evidence by the examination of witnesses who appear before it, and in no other way. Depositions, even of nonresident property owners, cannot be considered. *State ex rel. Giroux v. Lien,* 112 Wis. 282, affirmed; *State ex rel. Vilas v. Wharton,* 117 Wis. 558, explained. *State ex rel. deForest v. Hobe,* 8

9. A board of review cannot waive the requirements of sec. 1061, Stats. 1898, as to the taking of evidence before it. *Ibid.*

Same: Decision: Review on certiorari.

10. The decision of a board of review upon a matter properly before it cannot be reversed on a common-law writ of *certiorari* merely because, in the opinion of the court, it is against a clear preponderance of the evidence. If the evidence affords a reasonable basis, from the standpoint of the board, for the decision the error is not jurisdictional. *State ex rel. J. S. Stearns L. Co. v. Fisher,* 271

11. Testimony of the owner's agent that two fifths of a quantity of logs were worth only $5 per M., together with his refusal to state the value of the remainder, did not so impeach the assessor's valuation of the whole quantity at $10 per M. as to make it a jurisdictional error for the board of review to uphold that valuation. *Ibid.*

Delinquent taxes: Collection by county: Accounting with towns.

12. A county board cannot, by a mere resolution instructing the treasurer to balance all accounts between the county and the several towns therein, settle or discharge the claim of a town for money collected by the county for delinquent taxes. *Spooner v. Washburn Co.* 24

13. To give the county board jurisdiction of such a matter, a claim in appropriate form must be presented on behalf of a town, and the town must be given an opportunity of prosecuting its demand and of taking an appeal from a decision adverse to it. *Ibid.*

14. The amount "due the county for unpaid county taxes," within the meaning of sec. 1114, Stats. 1898, is the sum which equals in amount the county tax, with interest allowed thereon by statute, and all the fixed charges and necessary expenses allowed by law, including those incurred by the county for illegal assessments embraced in the delinquent return, and the five per cent. collection fees on all amounts actually collected by the county; and all sums collected on delinquent taxes in excess of said amount belong, with the interest and charges thereon, to the town, city, or village from which such taxes were returned as delinquent. *Ibid.*

15. Though the purchase of land by the county at a tax sale is not a collection of the tax within the meaning of sec. 1114, Stats. 1898, yet the taking of a tax deed, vesting the title in the county and giving it full power of disposition, is such collection, and the county is chargeable in such a case with the redemption value of the tax certificate at the time the deed was executed, and for the redemption value of outstanding tax certificates on the land, as well as all subsequent taxes remaining unpaid which were levied while the county owned the land. *Ibid.*

16. Where the county board, without authority of law, and not under secs. 1155, 1184, or 1210*g*, Stats. 1898, "compromised" or "canceled" unpaid deliquent taxes or ordered that outstanding certificates be transferred at less than their face value, the county is chargeable with the face value of the tax, interest, and charges up to the date of such compromise, cancellation, or transfer. *Ibid.*

17. Where a town returned as delinquent certain taxes on railroad lands, and in an action by the railroad company such taxes were declared void, the costs for which judgment was rendered against the county in such action were a necessary expense for which it should be reimbursed out of moneys collected on the delinquent return of the town. *Ibid.*

18. The account between a county and a town in respect to delinquent taxes collected by the county is analogous to an open account between persons, and the county is liable for interest on any amount due the town only after failure, upon due demand, to pay the same. *Ibid.*

Sales of land for taxes. See COUNTIES, 6. TAX TITLES.

Special assessments. See MUNICIPAL CORPORATIONS, 2, 5–16.

Mandamus to compel levy of tax. See COUNTIES, 5.

TAXATION OF COSTS. See BASTARDY, 4.

TAX TITLES.

See COUNTIES, 6. DEEDS, 2, 3. JUDGMENT, 4. MUNICIPAL CORPORATIONS, 11–13. TAXATION, 15.

1. An agreement by an attorney of a bank to purchase at a tax sale, with his own money, real property of the bank which it claims is exempt, and to hold the certificate of sale subject to the future desire of the bank to acquire it in case it should be adjudged valid, is not fraudulent or illegal, nor does such a purchase amount to a voluntary payment of the tax by the bank which would preclude it from suing to have the certificate declared void. *First Nat. Bank v. Douglas Co.* 15
2. The facts that an attorney for a bank borrowed from the bank on his note a sum sufficient to purchase a tax certificate on real property of the bank and requested another person to take and hold the certificate subject to his directions, and it was so purchased, do not show that the certificate was purchased by, or held in trust for, the bank. *Ibid.*
3. If such tax certificate is adjudged void in an action by the bank against the county and the purchaser, the latter, by virtue of his legal title, has a right, as against the county, to a return of the money paid for the certificate. *Ibid.*
4. Substantial adherence to the statutory form of tax deed is all that is necessary; but the omission of any material requirement of that form, which is not supplied by necessary inference from the other parts of the deed, is a fatal defect. *Washburn Land Co. v. C., St. P., M. & O. R. Co.* 305
5. When the opening recital in a tax deed, as to whether the applicant therefor presented himself as the purchaser at the tax sale or as assignee of the certificate, contradicts the later part where the name of the purchaser is required to appear, the instrument fails to show with reasonable certainty who was in fact such purchaser and that the applicant for the deed was entitled thereto, and is fatally defective. *Ibid.*
6. A recital in a tax deed that the tax sale was made at the office of the county treasurer in Bayfield county, sufficiently shows that the sale was at a public place at the seat of justice of the county, as required by sec. 1130, Stats. 1898. *Ibid.*
7. A tax deed covering a large number of tracts consisted of several printed forms attached together, all the printed portions except that preceding the space for description of land in the first form and that following said space in the last form being erased so as to leave sufficient space for writing in all the descriptions. *Held*, that this did not render the deed defective nor the record thereof, in similar form, insufficient. *Ibid.*

TITLE.

To land. See ADVERSE POSSESSION. COUNTIES, 5, 6. DEEDS. EJECTMENT. JUDGMENT, 3, 4. MORTGAGES. REFORMATION. SPECIFIC PERFORMANCE. TAX TITLES. WILLS.

To personalty. See ASSIGNMENT. BANKS, 1. CONVERSION. GARNISHMENT. PARTNERSHIP, 8. SALES. WILLS.

TORTS. See ADJOINING LANDOWNERS. CONVERSION. DEATH. FRAUD. HIGHWAYS, 5–9. LIMITATION OF ACTIONS, 1, 2. MALICIOUS PROSECUTION. MASTER AND SERVANT, 8–20. NEGLIGENCE. RAILROADS, 11–14. WATERS.

TOWN-LINE ROADS. See HIGHWAYS, 2–4.

TOWNS.

See COUNTIES, 1. EVIDENCE, 7. HEALTH. HIGHWAYS, 2–9. TAXATION, 12–18.

Where, prior to the formation of a new town from a part of a town already organized, the latter had contracted to pay a certain sum annually to a water company for hydrant rentals, such rentals accruing after the division of the town were not, at the time of such division, any part of "the indebtedness then legally incurred" by the old town, within the meaning of sec. 672, Stats. 1898, providing for apportionment of such indebtedness. *Vaughn v. Montreal,* 302

TRACTION ENGINES. See EVIDENCE, 7. HIGHWAYS, 8, 9.

TRESPASS. See ADJOINING LANDOWNERS.

TRIAL.

Order of trial: Several actions involving same subject: Consolidation. See ACTION, 10.

Examination of jurors on voir dire: Challenges, etc. See JURY, 4–12.

Amendment of pleadings at trial. See CONTRACTS, 12. NEGLIGENCE, 2.

Reception of evidence: Rebuttal: Discretion. See CRIMINAL LAW, 2.

Taking case or question from jury. See CONVERSION, 2. CRIMINAL LAW, 9. FISH AND GAME, 6. HIGHWAYS, 9. HOMICIDE, 4. HUSBAND AND WIFE, 1. MASTER AND SERVANT, 10, 14. RAILROADS, 10–12. TRIAL, 3. WATERS.

Arguments and conduct of counsel. See APPEAL, 11.

Instructions to jury. See APPEAL, 5, 6, 10, 11. BASTARDY, 2, 3. CONTRACTS, 1, 4. CRIMINAL LAW, 9–11. FALSE PRETENSES, 3. GUARANTY, 4. HOMICIDE, 7–13. MASTER AND SERVANT, 5–7, 15, 16. NEGLIGENCE, 3–7.

1. An instruction that by a "preponderance of the evidence" is meant "the evidence which satisfies and convinces your minds and judgments," is *held* erroneous. That term should properly be defined, in effect, as outweighing in convincing force the evidence on the other side. *Grotjan v. Rice,* 253
2. Refusal to give requested instructions correctly stating the law applicable to the case is error unless the substance thereof is otherwise given to the jury. The presumption that every one knows the law does not so apply as to justify such refusal. *Ibid.*

Verdict: General. See CRIMINAL LAW, 12, 13.

Verdict: Special. See CRIMINAL LAW, 14. GUARANTY, 3. MASTER AND SERVANT, 15.

Judgment notwithstanding verdict.

3. Where on the undisputed facts a verdict for defendant should have been directed, it is proper to grant judgment for defendant notwithstanding the verdict. *Hammacher v. New Berlin,* 249

TROVER AND CONVERSION. See CONVERSION.

TRUSTS AND TRUSTEES. See TAX TITLES, 2.

UNCERTAINTY in general verdict. See CRIMINAL LAW, 12, 13.

VALUE: EVIDENCE. See FALSE PRETENSES, 2. WITNESSES, 1.

VARIANCE. See CONTRACTS, 12.

VENDOR AND PURCHASER OF LAND. See CONTRACTS, 3. DEEDS. REFORMATION. SPECIFIC PERFORMANCE.

VERDICT. See CRIMINAL LAW, 12–14. GUARANTY, 3. MASTER AND SERVANT, 15.

VESTED RIGHTS. See MUNICIPAL CORPORATIONS, 9.

VOIR DIRE. See APPEAL, 11. JURY, 4.

VOLUNTARY CONVEYANCE. See DEEDS, 3.

VOLUNTARY PAYMENT. See MUNICIPAL CORPORATIONS, 15, 16. TAX TITLES, 1, 2.

WAIVER.
Of discharge as indorser. See BANKS, 4, 5.
Of challenge. See JURY, 12.
Of notice of personal injury. See LIMITATION OF ACTIONS, 2.
Of specific instructions to jury. See MASTER AND SERVANT, 5, 15.
Of requirements as to evidence. See TAXATION, 9.

WARDENS. See FISH AND GAME, 2, 5.

WATERS.

Nuisance: Overflowing land.

In an action for damage to hay on plaintiff's meadow lands along a river, alleged to have resulted from defendant's piling logs on the ice in such quantities that they broke through and formed a dam, causing the river to overflow the meadows, the evidence showed that defendant had contracted to buy the logs, which were to be delivered in the river afloat in time for the spring drive, and had contracted with other persons to drive the logs, but that at no time was defendant in control of the logs or responsible for the manner in which they were handled. *Held*, that a verdict for defendant was properly directed. *Jacobs v. Hershey L. Co.* 54

Same: Eavesdrip. See ADJOINING LANDOWNERS.

Fish taken from inland waters. See FISH AND GAME, 7.

WILLS.

1. A will gave to testator's wife "all my estate . . . for her use, benefit, and control during her natural life, if she does not again marry," and provided for division of "all my said estate" after her death or in case of her remarriage. It empowered the executor and the wife to sell the real estate, with the approval of the adult children, "in case it be for the benefit of my said wife or the benefit of my estate." *Held*, that the wife took only a life estate, with no right to consume the corpus of the estate or the proceeds of any sale of realty, and that such a sale could not be made if the children disapproved. *Schneider v. Schneider*, 111

2. A will giving to the testator's widow during widowhood, and until his youngest child should arrive at the age of maturity, "all my property of whatever description . . . including my interest in the firm," etc., did not give the widow such partnership interest as a specific bequest, to be enjoyed by her *in specie*, but merely mentioned such interest for greater certainty and disposed of it in the same way as the other property. *Stehn v. Hayssen*, 583

WITNESSES.

Competency. See PARTNERSHIP, 3.

1. A witness who testified that he had worked on logs about fifteen winters and knew the value of certain logs was competent, *prima facie*, to testify as to that value, although he had never bought or sold logs himself. *Rylander v. Laursen*, 2
2. A wife is a competent witness against her husband in an action against him to recover for necessaries furnished to her. *Morgenroth v. Spencer*, 564

Privileged communications. See RAPE, 1.

Impeachment. See APPEAL, 9. MASTER AND SERVANT, 4.

WORDS AND PHRASES.
Abutting lots, in statute. See MUNICIPAL CORPORATIONS, 2.
Accrued without this state, in statute. See LIMITATION OF ACTIONS, 3.
As appears by the poll list, in statute. See MUNICIPAL CORPORATIONS, 1.
Capital of bank, in statute. See TAXATION, 2.
Cause of action, in statute. See ACTION, 2–4, 9.
Collection of tax. See TAXATION, 15.
Debt of another, in statute. See FRAUDS, STATUTE OF.
Defense, in statute. See PLEADING, 4.
Efficient cause of injury. See MASTER AND SERVANT, 13.
Expenses of administration, in statute. See EXECUTORS.
Extension of existing line upon any street, etc., in statute. See STREET RAILWAYS.
Final order, in statute. See APPEAL, 1.
Fine, in statute. See JUSTICES' COURTS, 3.
Forthwith, in judgment. See BASTARDY, 4.
Future maintenance, in statute. See BASTARDY, 1.
Indebtedness then legally incurred, in statute. See TOWNS.
Interlocutory judgments, in statute. See APPEAL, 2.
Interstate commerce. See COMMERCE, 3.
Length of proposed railroad, in statute. See RAILROADS, 2.
Liable to taxation, in statute. See MUNICIPAL CORPORATIONS, 11, 12.
Lots fronting or abutting on street, in statute. See MUNICIPAL CORPORATIONS, 2.
May, in statute. See INSURANCE, 2. STATUTES, 2.
Official capacity, in statute. See BRIBERY.
Ordinary care. See NEGLIGENCE, 3.
Part performance of contract. See SPECIFIC PERFORMANCE, 4, 5.
Person, in statute. See COUNTIES, 6.
Places to and from which railroad is to be constructed, in statute. See RAILROADS, 1.
Preponderance of the evidence. See TRIAL, 1.
Primary right. See ACTION, 2–4, 8.
Public place at seat of justice, in statute. See TAX TITLES, 6
Railroad company, in statute. See RAILROADS, 14.
Satisfactorily, in contract. See CONTRACTS, 8.
Shall, in statute. See INSURANCE, 2. STATUTES, 2.
Substantial performance. See CONTRACTS, 2.
Sum then due for unpaid county taxes, in statute. See TAXATION, 14.
Survivors. See INSURANCE, 8.
Taking property for public use. See MUNICIPAL CORPORATIONS, 4.
Transaction, in statute. See ACTION, 3–9.

WORK AND LABOR. See MASTER AND SERVANT, 1–7.

WRIT OF ERROR. See APPEAL AND ERROR.

5733 058

HARVARD LAW LIBRARY